89-542

No. __-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RUDY PERPICH, as Governor of the State of Minnesota, and THE STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (PART I)

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QUESTION PRESENTED

Can Congress abrogate the States' specifically reserved authority for militia training in the absence of a declared national emergency without violating the militia training clause of the United States Constitution, art. I, § 8, cl. 16?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following are respondents: United States Department of the Air Force, United States Department of the Army, National Guard Bureau, the Secretary of Defense, the Secretary of the Army, the Secretary of the Air Force, and the Chief of the National Guard Bureau.

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IN THE

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No. ———

RUDY PERPICH, as Governor of the State of Minnesota, and THE STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on June 28, 1989.

OPINIONS BELOW

The en banc opinion of the Court of Appeals for the Eighth Circuit is reported at 880 F.2d 11, and is reprinted in the appendix hereto (Part I), p. A-1.

The panel opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the appendix hereto (Part II), p. A-63.

The memorandum decision of the United States District Court for the District of Minnesota (Alsop, J.) is reported at 666 F. Supp. 1319, and is reprinted in the appendix hereto (Part II), p. A-141.

JURISDICTION

Invoking federal jurisdiction under 5 U.S.C. § 702 and 28 U.S.C. §§ 1331, 2201 and 2202, the petitioners brought this suit in the District of Minnesota. On August 3, 1987, the District of Minnesota granted the respondents' motion for summary judgment and denied the petitioners' motion for summary judgment. See p. A-153.

On petitioners' appeal, a three-judge panel of the Eighth Circuit on December 6, 1988, reversed the judgment of the district court and remanded the matter for further proceedings consistent with the panel's opinion. See p. A-123. Respondents moved for rehearing *en banc*. On January 11, 1989, the Eighth Circuit granted respondents' motion for rehearing *en banc*, and vacated the court's opinion and judgment of December 6, 1988. See p. A-62.1. On June 28, 1989, the judgment of the district court was affirmed by the Eighth Circuit. See p. A-14.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cls. 15 and 16 provide:

> The Congress shall have power . . .
>
> [15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> [16] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

U.S. Const. art. 1, § 8, cl. 12 provides:

> The Congress shall have power . . .
>
> [12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . .

10 U.S.C. §§ 672(b) and (d) (1982) provide:

> (b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the

State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

* * *

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

10 U.S.C. § 672(f) (Supp. IV 1986) provides:

(f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

STATEMENT OF THE CASE

Respondents ordered members of the Minnesota National Guard to federal active duty for training missions in Central America pursuant to 10 U.S.C. §§ 672(b) or 672(d). Complaint, para. 16. Members of the Minnesota National Guard are also enlisted in the National Guard of the United States, a reserve component of the national armed forces. 32 U.S.C. §§ 101(4-7), 304; 10 U.S.C. §§ 101(11-12), 261, 3261, 8261 (1982 & Supp. V 1987). Petitioner Governor Perpich is commander-in-chief of the State's military forces pursuant to Minn. Const. art. V., § 3, and Minn. Stat. § 190.02 (1988). Complaint, para. 3. He would not have consented to one of the training missions but for the restrictions imposed by 10 U.S.C. § 672(f) (hereinafter "Montgomery Amendment"). Complaint, para. 19. If Petitioner Perpich objects to the location, purpose, type or schedule of future orders directed at members of the Minnesota National Guard for active duty training outside the United States during peacetime, he would withhold his consent to such orders. *Id.*, para. 21.

Petitioners prayed for the district court to declare the Montgomery Amendment unconstitutional and moved for summary judgment. *Id.*, prayer for relief at p. 7. They argued that the Montgomery Amendment violates U.S. Const. art. I, § 8, cl. 16 (hereinafter "militia training clause") because that clause expressly reserves to each State authority to train the National Guard, which is the modern-day militia, and thereby requires State consent to National Guard training exercises in peacetime.

Respondents moved to dismiss the complaint. They argued that State consent to National Guard training is not constitutionally required when the National Guard is ordered to active

federal duty. When in federal service, the National Guard is subject to Congress' plenary power under U.S. Const. art. I, § 8, cl. 12 (hereinafter "army clause"), to provide for the national defense, respondents contended. They further argued, citing the *Selective Draft Law Cases*, 245 U.S. 366 (1918), that the militia training clause does not constrain Congressional authority under the army clause.

On August 3, 1987, the district court, adopting respondents' theory, dismissed the action. See p. A-153.

On December 6, 1988, a divided panel of the Eighth Circuit reversed the district court's judgment and remanded the matter for further proceedings consistent with its opinion. See p. A-123. It held that the Montgomery Amendment is unconstitutional because the militia training clause requires State consent to peacetime training of the National Guard.

On January 11, 1989, the Eighth Circuit granted respondent's petition for rehearing *en banc* and vacated the court's panel opinion and judgment of December 6, 1988. See p. A-62.1.

On June 28, 1989, a divided Eighth Circuit *en banc* affirmed the judgment of the district court. See p. A-1. It upheld the Montgomery Amendment on the ground that the militia training clause does not limit congressional authority to train the National Guard when it is in active federal service and, therefore, State consent to training exercises is not constitutionally required. The Eighth Circuit *en banc* opinion relied in part on the *Selective Draft Law Cases* in deciding that the Montgomery Amendment does not infringe on State training authority. The *Selective Draft Law Cases* "made clear that the army clause is not limited by the militia clause," the majority opinion asserted. See p. A-11. Thus, when Guard units are ordered into federal service in their role as a reserve component of the federal armed forces, the militia clause is not

applicable, it added. See p. A-12-13. Therefore, according to the Eighth Circuit majority, the Montgomery Amendment is a constitutional exercise of Congress' army powers. See p. A-13.

The dissent argued, in part, that *Selective Draft Law Cases* merely held that Congress could require compulsory military service during wartime and did not support the majority's view. See p. A-25. Furthermore, it construed the *Selective Draft Law Cases* to require a "national exigency" before the federal government can exercise its army power to supersede reserve State authority over militia training. See p. A-40-42. Almost a third of the 49-page dissenting opinion focused on the framers' intent in adopting the militia training clause. It concluded that reserved State authority over the militia "represented [a] fundamental structural decision[] by the Framers" designed to insulate militia authority "from uncontrolled and potentially irresponsible short-term political reaction." See p. A-31.

REASONS FOR GRANTING THE WRIT

DECIDING THAT THE STATES' EXPRESS CONSTITUTIONAL AUTHORITY OVER PEACETIME NATIONAL GUARD TRAINING CAN BE NEGATED BY CONGRESS IS AN EXCEPTIONALLY IMPORTANT ERROR DISPLACING AN ASPECT OF STATE SOVEREIGNTY THAT SHOULD BE PROMPTLY CORRECTED.

1. The Eighth Circuit's Decision Is Exceptionally Important.

The Eighth Circuit made an exceptionally important decision by abrogating a power explicitly reserved to the States by U.S. Const. art. I, § 8, cl. 16. Because the case involves the important subject of federal-state relations coupled with the sensitive matter of governmental power to authorize National Guard training, the Eighth Circuit decision has implications for all the States and the federal government. A decision on such an issue, depriving the states of constitutionally-granted authority, should not remain unreviewed by this Court.

The decision that the States can be stripped of their authority regarding militia training is all the more egregious because the power is expressly conferred by the Constitution. "With rare exceptions, like the guarantee, in Article IV, § 3, of State territorial integrity, the Constitution does not carve out express elements of State sovereignty that Congress may not employ its delegated powers to displace." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985). The militia training clause, like article IV, § 3,[1] is one of those rare exceptions.

---

[1] U.S. Const., art. IV, § 3 requires State legislative consent for the formation of any State "by the junction of two or more states or parts of states . . . ."

The Montgomery Amendment should not be permitted to contravene "the general conviction that the Constitution precludes 'the National Government [from] devour[ing] the essentials of state sovereignty.' " *Id.* at 549 (citation omitted). This Court's repeated recognition "that state sovereignty is a fundamental component of our system of government" and that "the states possess constitutionally preserved sovereign powers," *id.* at 573-74, (Powell, J., dissenting), will be undermined by the Montgomery Amendment if this Court does not review and reverse the circuit court.

Although this Court denied a petition for a writ of certiorari to the United States Court of Appeals for the First Circuit in a similar State challenge to the constitutionality of the Montgomery Amendment, *Massachusetts v. United States Dept. of Defense*, 109 S.Ct. 1743 (1989), "denial of a writ of certiorari imparts no expression upon the merits of a case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). Thus, this Court has not addressed the merits of a challenge to Congressional abrogation of the States' expressly reserved power to authorize militia training.

The Court should address the constitutionality of the Montgomery Amendment now because military training authority is directly implicated in the circuit court's decision. The proper allocation of such authority is a sensitive governmental function that should not be the subject of multiple, prolonged and confusing litigation.

There is a realistic potential for intercircuit conflict on the constitutionality of the Montgomery Amendment. The Eighth Circuit panel decision was, before its vacation, directly in conflict with a decision in the First Circuit. *Dukakis v. United States Department of Defense*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied sub nom. Massachusetts v. United States Dept. of Defense*, 109 S. Ct. 1743 (1989). Thus, an intercircuit split has

occurred in the past and, therefore, is not a remote future possibility. Furthermore, the Court of Military Appeals concluded before enactment of the Montgomery Amendment that the gubernatorial consent requirement of 10 U.S.C. § 672(d) "has constitutional underpinnings" in the militia clause. *United States v. Peel*, 4 M.J. 28, 29 (C.M.A. 1977); *accord United States v. Self*, 13 M.J. 132, 135 (C.M.A. 1978); *United States v. Hudson*, 5 M.J. 413, 418 (C.M.A. 1978). Thus, there is a real potential for a split between the Court of Military Appeals and the First and Eighth Circuits.

The exceptional importance of authoritatively resolving the validity of the Montgomery Amendment is indicated by the fact that 28 States participated as *amici* in the Eighth Circuit. See p. A-5, n.5. As respondents properly advised the Eighth Circuit, this matter encompasses "issues of exceptional practical and legal importance." Petition For Rehearing and Suggestion For Rehearing *En Banc* at 5. Furthermore, as respondents have observed, the emergence of conflicting court decisions on this issue "can be expected to spawn confusion and much litigation . . . ." *Id.* at 15, n.10. This case presents the Court with an opportunity to avoid needless confusion and litigation on a sensitive subject.

The circumstances presented to this Court in the earlier petition for a writ of certiorari are significantly different here and make the issue ripe for an authoritative review by the Court. In the earlier case, the First Circuit affirmed the judgment of the District Court upholding the Montgomery Amendment in a one-sentence opinion. *Dukakis v. United States Department of Defense*, 859 F.2d 1066 (1st Cir. 1988). In this case, the constitutionality of the Montgomery Amendment was independently analyzed in an extensive opinion by the circuit court. Furthermore, the dissenting opinion in the

Eighth Circuit case presents a careful review of historical materials evidencing the framers' intent in adopting the militia training clause. Thus, this Court's review of the validity of the Montgomery Amendment now would have the benefit of extensive prior consideration by the circuit court, a benefit not presented by the earlier petition.

2. There Are Strong Reasons To Believe The Eighth Circuit's Decision Was Wrong.

The Eighth Circuit erroneously framed the issue before it this way:

> The issue, simply put, is this: when the State claims a right to control Militia training, and Congress claims, 'we're training the Army, not the Militia,' who wins?

See p. A-9.

By reducing the interplay of the militia training and army clauses to a semantical word game with a predictable winner, the Eighth Circuit oversimplified the issue before it and reached a wrong conclusion. A proper constitutional analysis would examine the text of the relevant provisions in light of the framers' intentions. *Woodson v. Murdock*, 89 U.S. (22 Wall.) 351, 369 (1874) (constitutional provisions construed "to express the intention of the framers"). However, the Eighth Circuit *en banc* opinion does not consider the framers' intent at all, and that intent is inconsistent with the circuit court's conclusion.

Neither the text of the militia training clause nor the framers' intent in drafting it support the circuit court's conclusion that the Montgomery Amendment is constitutional. The text, as the dissenters put it, "is an unambiguous command . . . which we cannot ignore." *See* p. A-32.

In an exhaustive examination of historical sources evidencing the framers' intent, the dissent found no indication that "the Framers believed the power to raise armies could supersede reserved state authority over the militia at will." See p. A-29. On the contrary, the framers' intent was to reach a workable compromise between advocates of strong federal control over State militias, who sought to assure the creation and maintenance of an effective national military force, and States' rights proponents, who feared excesses by a powerful standing army controlled by federal authorities. See p. A-19.

One of the resulting compromises was to divide State militia authority between federal and State governments. The federal government was authorized to arm, organize, and discipline the militia. It would also govern the militia when employed in federal service. However, the framers reserved to the States the appointment of officers and the authority of training the militia according to federal standards. This compromise is unambiguously incorporated into the text of U.S. Const. art. I, § 8, cls. 15 and 16.

The framers did not intend that either the State's reserved powers of appointment and/or its reserved power to authorize training could be usurped at will under the army power by transforming the State militia into a federal force for any reason or no reason without regard to whether or not national security was threatened. Such unrestrained federal authority would mean, as the dissenting opinion put it, that "the federal government could use the army power at will to make the militia a federal force under its plenary control, [and] the Militia Clauses could not serve their intended purpose to protect the states against potential oppression by the federal army." See p. A-30. A divided federal-State authority over the militia was intended to quiet the fear of some framers "that

if the militia did not exist to protect state interests, the army might be used by the federal government to oppress the states and their citizens." See p. A-29. Thus, the militia training clause expressly preserves an aspect of the States' sovereignty —their power to authorize militia training.

The States retain sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985). The power to authorize militia training not only was not transferred by the Constitution to the federal government, but instead was expressly reserved to the States.

The reliance of the national government on an effective National Guard available for federal service when required presents no obstacle to respecting the State's expressly reserved authority over National Guard training. The National Guard remains available for federal service for any constitutionally permissible purpose, which includes the execution of federal laws, suppression of insurrections and repelling invasions. U.S. Const. art. I, § 8, cl. 15.

Furthermore, the *Selective Draft Law Cases*, 245 U.S. 366 (1918), properly construed, authorize the use of the National Guard in cases of acknowledged "exigencies." The Court in *Selective Draft Law Cases* stated:

> But the duty of exerting the [Army Clause] power thus conferred in all its plentitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the *exigencies* which would call it in part or in whole into play.

245 U.S. at 382-83 (emphasis added). Thus, the Army Clause may be invoked to train National Guard members whenever an

emergency is declared by Congress or, additionally, as the dissent suggested, the President. See p. A-40-42.

Nothing in the *Selective Draft Law Cases*, which merely upheld the federal government's authority to conscript male citizens during wartime, suggests that the militia training clause can be rendered superfluous whenever the federal government chooses to designate the National Guard as a federal entity and order that entity to engage in training.

The circuit court's reliance on the *Selective Draft Law Cases* for the proposition that "the army clause is not limited by the militia clause" is not well-founded. By construing the interplay of the two clauses to permit the army clause to checkmate the militia training clause, the circuit court opinion collides with this Court's obligation to construe constitutional provisions so that "none . . . suffer subordination or deletion." *Ullman v. United States*, 350 U.S. 422, 428 (1955). The Eighth Circuit's sweeping construction of the *Selective Draft Law Cases* eviscerates the militia training clause. This is especially remarkable in light of the narrow holding of the case—that wartime conscription is within Congressional authority—and its express language cautioning against "weakening or destroying" either state or federal powers under the militia and army clauses. *Selective Draft Law Cases*, 245 U.S. at 384.

The expressly reserved State powers in the Constitution were "designed to keep the balance between the States and the nation outside the field of legislative controversy." *New York v. United States*, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting). The Eighth Circuit, by upholding the Montgomery Amendment, misplaces explicit reserved State authority over militia training squarely into the federal legislative arena.

The interplay of the militia and army clauses has not been directly addressed by this Court for more than 50 years because until now Congress has not sought to remove the States' expressly reserved militia training authority. Now that Congress has overstepped its limited authority over militia training, it is time for the Court to revisit the subject.

CONCLUSION

In light of the Eighth Circuit's exceptionally important error, the significance of a uniform national construction of the interplay of the army and militia training clauses in the context of authorizing National Guard training, the significant potential for inter-circuit conflicts on this issue, and the opportunity presented here to avoid unnecessary and prolonged confusion, the Court should grant this petition.

Respectfully submitted,

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September 26, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5345

Submitted: February 16, 1989
Filed: June 28, 1989

Rudy Perpich, Governor of the State of Minnesota;
State of Minnesota, by its Attorney General
Hubert H. Humphrey, III,

Appellants,

v.

United States Department of Defense, United States Department of Air Force, United States Department of Army, National Guard Bureau, Caspar W. Weinberger, Secretary of Defense; John O. Marsh, Jr., Secretary of the Army; Edward C. Aldridge, Secretary of the Air Force; Lt. Gen. Herbert R. Temple, Jr., National Guard Bureau,

Appellees.

Commonwealth of Massachusetts,

AMICUS CURIAE

U. S. National Guard Assn.,

AMICUS CURIAE

Appeal from the United States District Court for the District of Minnesota.

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, ARNOLD, JOHN R. GIBSON, FAGG, BOW-

MAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges, EN BANC.*

MAGILL, Circuit Judge.

In this opinion, we address a challenge to the constitutionality of the Montgomery Amendment, which restricts the power of state governors to withhold consent to federal deployment of the National Guard of the United States. We hold that the Constitution does not require gubernatorial consent to active duty for training of the National Guard of the United States. Based on the statutory system of dual enlistment and the relationship between the Constitution's army and militia clauses, we find the Montgomery Amendment to be a constitutional exercise of congressional power.

I.

In 1985 and 1986, several governors objected to deployment of National Guard personnel to Central America. The governors withheld (or threatened to withhold) their consent to federally ordered active duty missions by their States' National Guards. 10 U.S.C. § 672(b), (d) (1982).[1] In response,

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* The HONORABLE GERALD W. HEANEY, a member of the original panel, assumed senior status on December 31, 1988. The HONORABLE DONALD P. LAY, Chief Judge, did not participate in the consideration or decision of this case.

[1] Reserve units and members of the National Guard of the United States may be activated "at any time * * * for not more than fifteen days a year," but not without the governor's consent:

> *At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit*, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary *to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor* of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

10 U.S.C. § 672(b) (emphasis added).

An individual reservist may be ordered to and retained on active duty "at any time" with the consent of both the reservist and the governor of his state guard:

> At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

Id. § 672(d).

[2] **The Montgomery Amendment**, section 522 of the Defense Authorization Act for Fiscal Year 1987, provides:

> The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

10 U.S.C. § 672(f) (Supp. IV 1986).

[3] The defendants, the Departments of Defense, Army, and Air Force and their Secretaries, and the National Guard Bureau and

Congress enacted the Montgomery Amendment, which prohibits the governors from withholding consent to active duty outside the United States because of objections to the location, purpose, type, or schedule of active duty. *Id.* § 672 (f) (Supp. IV 1986).[2]

Members of the Minnesota National Guard participated in three active duty training missions in Central America in January 1987. After the Guard returned, Governor Rudy Perpich, the Commander in Chief of the State's military forces, objected to defendants' ordering the Guard to active duty for training in Honduras.[3] Because Perpich wanted to

withhold consent to further orders, the Governor and the State of Minnesota filed this suit. Perpich sought a declaration of the governors' constitutional authority to withhold consent to peacetime training of the Guard outside of the United States. Perpich asked specifically for a declaration that the Montgomery Amendment infringes "the Authority of training the Militia" reserved to the States by the Constitution. U.S. Const. art. I, § 8, cl. 16. Perpich also sought to enjoin any federal order commanding members of the Minnesota unit of the National Guard to active duty for training outside of the United States without Perpich's consent.

The district court,[4] in a well-reasoned opinion, held that the dual enlistment system, under which Guard members enlist and serve in both the state National Guard and the federal National Guard of the United States, was a necessary and proper exercise of Congress' power to raise and support armies. *Perpich v. United States Department of Defense*, 666 F. Supp. 1319, 1323 (D. Minn. 1987). The court also held that the States' authority to train the militia did not inhibit Congress' power to provide for active duty training of the National Guard of the United States without the governors' consent. *Perpich*, 666 F. Supp. at 1325; *accord Dukakis v. United States Department of Defense*, 686 F. Supp. 30, 38 (D. Mass.), *aff'd* 859 F.2d 1066 (1st Cir. 1988) (per curiam), *cert. denied*, 109 S. Ct. 1743 (1989). The court granted summary judgment to defendants, and Perpich appealed.

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its Chief, are the individuals and entities authorized to order reserves to active duty under § 672(b) and (d). We take judicial notice that other members or units of the Minnesota Guard have been or may be ordered to active duty for reserve training in Central America.

[4] The Honorable Donald J. Alsop, United States District Judge for the District of Minnesota.

A divided panel of this court reversed, holding that the Montgomery Amendment violated the constitutional reservation of state authority to train the Militia, and that National Guard personnel could not be ordered to active duty for training without the consent of the States unless the Congress or the President first declared a national security emergency or exigency. *Perpich v. United States Department of Defense*, No. 87-5345, slip op. (8th Cir. Dec. 6, 1988). On January 11, 1989, this court granted rehearing en banc, thus vacating the opinion of the panel. We now affirm the judgment of the district court upholding the constitutionality of the Montgomery Amendment.

II.

This case involves conflicting assertions of sovereignty by the state and national governments. Perpich[5] claims the constitutional authority to withhold consent for National Guard training outside the United States in peacetime. The Department of Defense contends that, when Congress acts under its constitutional power to raise and support armies, it may authorize active duty to train reserve forces without infringing the States' authority over militia training. The Department of Defense also contends that a governor's decision to withhold consent based on objections to the location

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[5] The States of Colorado, Maine, Massachusetts, Ohio and Vermont appear jointly as amici curiae in support of appellants. The National Guard Association of the United States (supported by the states of Alabama, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Wisconsin, and the Adjutants General Association of the United States and the Enlisted Association of the National Guard of the United States), the Firearms Civil Rights Legal Defense Fund, and the Military Order of the World Wars appear separately as amici curiae in opposition to appellants.

or purpose of Guard training would infringe the national government's exclusive authority to conduct the national defense.

Today, the *militia* (with a number of exceptions of no importance here) consists of all able-bodied male citizens ages 17 to 45 and of female citizens who are commissioned officers of the National Guard. 10 U.S.C. § 311(a). The militia is divided into two classes, the *organized militia* and the *unorganized militia*. *Id.* § 311(b). The *National Guard* is the organized militia of the several States. *Id.* § 101(10), (12).[6] The *National Guard of the United States* (NGUS) consists of the members of the National Guard or organized militia who are also enlisted in a reserve component of the United States Army or Air Force. *Id.* § 261.[7]

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[6] "The term 'National Guard' means the Army National Guard and the Air National Guard." *Id.* § 101(9). "Army National Guard" means:

> that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—
>
> (A) is a land force;
>
> (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;
>
> (C) is organized, armed, and equipped wholly or partly at Federal expense; and
>
> (D) is federally recognized.

Id. § 101(10). "Air National Guard" defines a like air force. *Id.* § 101(12). Parallel definitions are found at 32 U.S.C.A. § 101(4) (Army National Guard), (6) (Air National Guard).

In this opinion we use "the Guard" to refer generally to the dually enlisted organized militia, adhering elsewhere to current statutory definitions in referring to the National Guard of the several States and the National Guard of the United States.

[7] "'Army National Guard of the United States' means the reserve component of the Army all of whose members are members of the Army National Guard." 10 U.S.C. § 101(11). "'Air National Guard of the United States' means the reserve component of the Air Force all of whose members are members of the Air National Guard." *Id.* § 101(13).

In 1933, Congress established the *National Guard of the United States* as a component of the Army of the United States. Act of June 15, 1933, ch. 87, § 5, 48 Stat. 155. The National Guard of the United States consisted of the federally recognized members and units of the National Guard of the several States. *Id.* The 1933 Act created a *dual enlistment system*, *id.*, §§ 7-11, 48 Stat. 156-57, whereby "an incoming guardsman joined both the National Guard of his home state and the National Guard of the United States, a reserve component of the U.S. Army." *Johnson v. Powell*, 414 F.2d 1060, 1063 (5th Cir. 1969). The President was authorized to order any or all units or members of the National Guard of the United States into active military service, if Congress first declared a national emergency and authorized the use of armed land forces in excess of the number of regular troops. Act of June 15, 1933, ch. 87, § 15, 48 Stat. 160. In establishing the National Guard of the United States, Congress invoked its army clause powers. H.R. Rep. No. 141, 73rd Cong., 1st Sess. 3-4 (1933); *see generally* Weiner, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 187 (1940).

In 1952, Congress enacted the legislative forerunners of 10 U.S.C. § 672(b) and (d) as part of a comprehensive strengthening of the armed forces' reserve components. Armed Forces Reserve Act of 1952, ch. 618, § 233(c), (d), 66 Stat. 481, 490. *See* S. Rep. No. 1795, 82nd Cong., 2d Sess. (1952), *reprinted in* 1952 U.S. Code Cong. & Admin. News 2005. The Army National Guard of the United States and the Air National Guard of the United States were designated as reserve components in the Ready Reserve of the Army and Air Force, respectively. Armed Forces Reserve Act of 1952, §§ 202, 208(c), 66 Stat. at 483-84.

Today, Congress authorizes active reserve duty for the National Guard of the United States in a variety of circum-

stances.[8] The Army and Air National Guard of the United States, established and maintained under Congress' army power, function as reserves in the United States Army and Air Force "to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires." 10 U.S.C. § 262.

Under the "Total Force" structuring of American military forces, reserve components, including the National Guard of the United States, are fully integrated with regular active forces in the national defense. *See* H.R. Rep. No. 1069, 94th Cong., 2d Sess. 325, *reprinted in* 1976 U.S. Code Cong. & Admin. News 1034, H.R. Rep. No. 107, 98th Cong., 1st Sess. 202 (1983). For example, the Army National Guard of the United States provides forty-six percent of the combat units and twenty-eight percent of the support forces of the total Army. The Army National Guard of the United States would provide eighteen of the twenty-eight army divisions, wholly or in part, in the event of full mobilization. The Air National

[8] In addition to the provisions of § 672(b) and (d), Reserves may be ordered to active duty in the following circumstances:

reserves may be ordered to active duty "in time of war or national emergency declared by Congress," for up to six months beyond the duration of the war or emergency, 10 U.S.C. § 672(a);

active duty for up to twenty-four months is authorized if the President declares a "national emergency," *id.* § 673(a);

the President may order a reservist to active duty for up to twenty-four months, if performance of his statutory reserve obligation has been delinquent or unsatisfactory, *id.* § 673a(a);

active duty for up to ninety days is authorized if the President "determines it is necessary to augment active forces for any operational mission," *id.* § 673b(a); and

commissioned officers of the Army National Guard of the United States may be ordered, with their consent, to active duty in the National Guard Bureau, *id.* § 3496(a).

Guard of the United States provides seventy-three percent of air defense interceptor forces, fifty-two percent of tactical air reconnaissance, thirty-four percent of tactical air lift, twenty-five percent of tactical fighters, seventeen percent of aerial refueling, twenty-four percent of tactical air support, and other forces. Supp. Jt. App. at 5 (reprinting *Hearings On Federal Authority Over National Guard Training Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Service*, 99th Cong., 2d Sess. (1986) (testimony of James H. Webb, Jr.)).

Article I, section 8, clause 12 gives Congress the power "to raise and support Armies * * * ." Clause 16 "reserv[es] to the States respectively the Authority of Training the Militia according to the discipline prescribed by Congress." Minnesota asserts its sovereignty over the organized militia, legally constituted as the Minnesota Units of the Army and Air National Guards. Defendants assert their authority over enlisted members of the National Guard of the United States. We consider whether Congress' qualification of the governor's consent provisions in section 672 infringes the States' "Authority of training the Militia according to the discipline prescribed by Congress." The issue, simply put, is this: when the State claims a right to control Militia training, and Congress claims 'We're training the Army, not the Militia,' who wins?

The authority given to Congress by the army clause is plenary and exclusive. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1872). In the *Selective Draft Law Cases*, 245 U.S. 366 (1918), the Court observed that "complete authority" over the "army sphere" was "conferred in all its plenitude" to Congress, with the exertion of that power "wisely left to depend upon the discretion of Congress as to the arising of

the exigencies which would call it in part or in whole into play." 245 U.S. at 382-83. More recently, the Court has observed that "the constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The dual enlistment system, under which Guard members enlist and serve in both a state National Guard and the federal National Guard of the United States, is a necessary and proper exercise of Congress' army power. *Perpich*, 666 F. Supp. at 1323. *See also Dukakis v. United States Department of Defense*, 686 F. Supp. 30 (D. Mass.), *aff'd*, 859 F.2d 1066 (1st Cir. 1988) (per curiam); *Johnson v. Powell*, 414 F.2d 1060, 1063 (5th Cir. 1969); *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wa. 1968). Congress' establishment of the ready reserve and authorization of active duty, for training or otherwise, also falls within the lawful scope of the army power, as an exercise of congressional discretion in prescribing the exigencies of military training and discipline. *See Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

Here Guard units were ordered into federal service for training in Central America in their role as the National Guard of the United States, a ready reserve component of the United States Army. The statutes authorizing this federal action are statutes grounded upon the army clause. These actions are beyond the reach of the militia clause.

While we could well conclude at this point, the vigorous argument of Perpich makes it proper that we further consider the scope of the militia clause.

III.

In the *Selective Draft Law Cases*, the Supreme Court upheld Congress' authority to draft individuals into the United States

Armed Services, notwithstanding their status as National Guard members already in the service of the United States. The Court held that Congress' power to conscript for the army under its authority to raise and support armies and to declare war was not confined to the express provisions for calling forth the militia. The Court reasoned that the one delegation of power to Congress (to call forth the militia) did not circumscribe the operation of another delegated power (to raise armies). 245 U.S. at 384.

Thus, the Supreme Court has made clear that the army clause is not limited by the militia clause:

> There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. * * * But because under the express regulations the power was given to call [the Militia] for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies in its

> potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas which were distinct and separate to the end of confusing both the powers and thus weakening or destroying both.

245 U.S. at 383-84. *Cox v. Wood*, 247 U.S. 3, 6 (1918), further explained the relationship between the two clauses:

> [T]he constitutional power of Congress to compel the military service which the assailed law commanded was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia, found in the Constitution.

Looking particularly to the *Selective Draft Law Cases*, the district court here, as well as that in *Dukakis*, concluded that the states' authority reserved in the militia clause does not apply to the period during which members are on active duty as a part of the National Guard of the United States. The *Dukakis* court made it clear that it did not read the *Selective Draft Law Cases* as a sweeping declaration that Congress is, in all circumstances, authorized by the army clause to bypass the reservation of power to the states in the militia clause. Faced with circumstances identical to those here, however, *Dukakis* held:

> Nevertheless, guided by the decisions in the dual-enlistment cases as well as *Selective Draft Law Cases*, I conclude that the reservation of power to the states over "the Authority of training the Militia according to the discipline prescribed by Congress," expressed in the Militia Clause, does not override the legitimately exercised power of Congress "[t]o raise and support Armies."

686 F. Supp. at 37. As in *Dukakis*, the district court in *Perpich* held that the dual enlistment system is a valid exercise of congressional power under the army clause and the necessary and proper clause. Because the authority to provide for national defense is plenary, the militia clause cannot constrain Congress' authority to train the Guard as it sees fit when the Guard is operating pursuant to the army clause. *Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319, 1323-24 (D. Minn. 1987). As the militia clause does not limit Congress' authority to train the National Guard of the United States while it is in active service, the gubernatorial veto is not constitutionally required. *Id.* at 1324. We are satisfied that the district court was correct in this holding.

Congress' army power is plenary and exclusive. The reservation to the States of authority to train the Militia does not conflict with Congress' authority to raise armies for the common defense and to control the training of federal reserve forces. The Montgomery Amendment is a constitutional exercise of Congress' army powers.

The judgment of the district court is affirmed.

HEANEY, Senior Circuit Judge, with whom McMillian, Circuit Judge, joins, dissenting.

I. *Introduction*

With a few strokes of the word processor, the majority has written the Militia Clause out of the United States Constitution. In so doing, it contradicts the clear intent of the founding fathers, who believed that state control over elements of the military was essential to a free and peaceful republic. To this end, they gave the states a degree of power over the militia, which they intended to be a significant element of our national defense. The majority ignores the unambiguous language of the Constitution, and disregards the historical construction given to the Militia Clause and the Army Clause by the three branches of the federal government and the states. The plain and unassailable fact is that, until Congress tacked the Montgomery Amendment on to a defense appropriations bill, it was not responsibly asserted that Congress had the power under the Constitution to require the National Guard to participate in peacetime training missions without the consent of the governor of the affected state.

The majority relies on the *Selective Draft Law Cases*, 245 U.S. 366 (1918), for the proposition that the Militia Clause imposes no limits on the power of Congress to declare war and raise armies. It neglects to note, however, that in those cases the Supreme Court merely held that Congress could require compulsory military service during wartime. The Supreme Court neither held nor suggested in that or any other case that Congress could require the National Guard to engage in training missions during peacetime without gubernatorial consent.

The majority places great reliance on the 1933 amendments to the National Defense Act. In that legislation, Congress

determined that the Army of the United States would consist of the regular Army, the National Guard of the United States, the state National Guard while in the service of the United States, the Officer Reserve Corps, the organized Reserve and the enlisted Reserves. It adopted the amendments to alleviate the necessity of drafting individual members of the National Guard into the army by allowing them to be called into service in whole units in the *"event of war or other national emergency so declared by Congress."* The act states in section 111 that:

> *When Congress shall have declared a national emergency* and shall have authorized the use of armed land forces * * * the President may * * * order into the active military service of the United States, to serve therein for the period of the war or emergency, * * * any or all units and the members thereof of the National Guard of the United States.

48 Stat. at 160. In the absence of war or national emergency, Congress left state control over the militia intact.

The majority's final argument is that the requirements of the modern Army are such that the Defense Department must have absolute power to order the National Guard to participate in peacetime training without gubernatorial consent. This assertion is not supported by any facts. To the contrary, the record shows that the efficiency of the National Guard has not been affected at all by the refusal of one or more governors to consent to a particular mission. Moreover, if in the future there is a danger that non-consent would affect our national security, a national emergency may be declared, as President Reagan did during the recent raid on Libya. *See* Exec. Order No. 12,543, *reprinted in* Dept. St. Bull. 37-38 (March 1986). This is a small price to pay for compliance with the Constitution.

I initially turn to the intent of the framers.

II. *The Intent of the Framers*

A. The Militia Clauses

The military power of the United States is based on a system of checks and balances. The Framers divided authority over the military, not only between the coordinate branches of the federal government, but also between the federal and state governments.

The latter division is emphasized in several ways. First, because of the Framers' fear that a large standing army would lead to military abuses by the federal government, state militias were intended to comprise the bulk of the nation's defensive force. Second, control over these militias was explicitly shared between the federal government and the states. (The states were to appoint the militia's officers and to control the actual training of militiamen.) Third, while the Framers did not want the states to make positive national policy in the areas of defense or foreign relations matters,[1] they did intend the states to use their control over the militia to prevent the federal government, except in circumstances where national security was threatened, from using state troops in military undertakings objectionable to the states and their citizenry.

Under the Articles of Confederation, the states were required to "keep up a well regulated and disciplined militia * * *." U.S. Arts. of Confed. art. VI. The central government had power to declare war and the supervisory authority

[1] The Constitution provides that "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; * * * keep Troops, or Ships of War in time of peace, enter into any Agreement or Compact with another State, or with a Foreign Power, or engage in War * * *." U.S. Const. art. I, § 10, cls. 1, 3.

to order the states to produce quotas of armed and trained troops. *Id.*, art. IX. This system proved unworkable. The states had too much independent power to resist the requests of the central government. The troops provided were often inadequately trained and equipped and thus difficult to coordinate into a cohesive and effective force.

Thus, as the delegates assembled during the summer of 1787 to draft a more viable instrument of government, a pressing objective was the creation of a stronger, more reliable armed force. This aim was widely shared. The effort to find a specific solution, however, proved extremely divisive. From the outset, it was agreed that the problem would not be solved by the creation of a large, federally controlled standing army. The Framers identified such a force with British tyranny, potential oppression of states and individual citizens, and expensive, unpopular military adventures.[2] Thus, while the Framers would ultimately provide for a standing army, they would limit its power by declaring that military appropriations had to be approved every two years. U.S. Const. art. I, § 8, cl. 12. More importantly, for the purposes of this discussion, the Framers stated their intent to have state militias

[2] *See* Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493, 1507-1541 (1969) (Friedman). Indeed, as delegate Edmund Randolph noted at the Virginia ratifying convention, "there was not a member of the federal convention who did not feel indignation" at the idea of a standing army. 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 401 (1901) (Elliot). *See also* Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 924 (1988) (Hirsch); Comment, *The Constitution and the Training of National Guard Officers: Can State Governors Prevent Uncle Sam From Sending the Guard to Central America?*, 4 J. L. & Pol. 597, 600, 601 (1988) (authored by P. Fish) (Comment).

provide for the nation's basic defense, with reliance on a standing army only as a last resort.[3]

As a corollary to the decision to rely largely on the militia for the nation's defense, it was believed necessary to provide a degree of federal control over these forces in order to achieve military effectiveness. The Convention rapidly agreed that the state militias would be placed under the control of the federal government in emergency situations, such as when insurrection or invasion was threatened, or when the militias were needed to enforce the laws of the country. *See* U.S. Const. art. I, § 8, cl. 15 (Clause 15) ("Congress shall have the power * * * [t]o provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions * * * .").[4] However, in other cases, the degree

[3] As the Supreme Court noted in *United States v. Miller*, 307 U.S. 174, 179 (1939), "The sentiment of the time [of the ratification of the Constitution] strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured through the Militia—civilians primarily, soldiers on occasion." *See also* Hirsch, *supra* note 2, at 924. Apparently, this view was a longstanding one, for Hirsch notes that militia "did the bulk of the fighting, often with success, in the War of 1812, the Mexican-American War, the Civil War (for both the Confederacy and the Union), and the Spanish-American War." *Id.* at 943. Hirsch points out that for the duration of the nineteenth century, "the militia remained the primary military force of the country." *Id.* at 944. "By 1898," he notes, "the regular army had 18,000 troops, compared to 115,000 militiamen." *Id.*

[4] The United States, at the time the Constitution was ratified, was a nation of extreme isolationist sentiment. According to one noted commentator, "[P]eace was expected to be the customary state of the new nation. America would avoid aggressive war abroad and enjoy in turn 'an insulated situation' from the great powers of Europe * * * . This placid view of foreign relations precluded any explicit consideration of the use of American force abroad, except for defensive naval action * * * ." W. T. Reveley, *War Powers of the President and Congress* 61 (1981).

of control the federal government would exercise over state militias was a point of contention.

Nationalist delegates believed in strong federal control of the state militias in order to create a dependable, coordinated defensive force.[5] States-rights delegates profoundly opposed such federal power.[6] These delegates voiced fears that powerful federal authority over the state militias would, like the existence of a large standing army, lead to military abuses by the new government. They particularly feared that such authority would allow the federal government to tyrannize defenseless individual states and their citizens[7] and could

[5] Early in the Constitutional Convention, for example, Alexander Hamilton presented a proposal urging "the militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them." *See* J. Madison, *Notes of Debates in the Federal Convention* 164 (Hunt 1920). The Convention ignored Hamilton's proposal.

[6] Madison's notes from the Federal Convention indicate the strong opposition many delegates voiced to giving the federal government too much control over the militia.

> Delegate Oliver J. Elsworth of Connecticut:
> The whole authority of the militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power.
> He thought the [general] Authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people. It must be vain to ask the States to give the Militia out of their hands.
> Delegate John Dickinson of Delaware:
> We are come now to a most important matter, that of the sword. His opinion was that the States never would nor ought to give up all authority over the Militia. He proposed to restrain the general power to one fourth part at a time, which by rotation would discipline the whole Militia.

Madison's Notes of the Federal Convention, *reprinted in*, S. Rep. No. 695, 64th Cong., 2d Sess. 33 (1917) (*The Militia*).

[7] Delegate Elbridge Gerry of Massachusetts feared that federal control over the militia would "enslave the states" and lead to a "system of despotism." *The Militia*, *supra* note 6, at 31, 33.

leave the states without the means to meet their own public needs.[8]

The debate between these factions was vigorous, for neither extreme had sufficient support at the Convention for its position to prevail.[9] After several months of discussion and many days of hard-fought exchange on the floor of the Convention, delegates, such as George Mason, began to seek a compromise which would provide the federal government with sufficient control over the militia to meet its defensive needs, while at the same time assuring the states sufficient authority to check the potential abuse of military power by the federal government.[10]

On August 21, 1787, the Convention was presented with a workable compromise. The new proposal provided the federal government the authority "[t]o make laws for organizing,

[8] Madison's notes contain the following:

> Mr. [Roger] Sherman [of Connecticut], took notice that the States might want their militia for defense [against] invasions and insurrections, and for enforcing obedience to their laws.

Id. at 34.

[9] *See* Friedman, *supra* note 2, at 1512-20.

[10] The power of states-rights delegates to exact significant concessions from the nationalist delegates is demonstrated in the course of the debates at the Federal Convention. Mason offered three successive proposals to the Convention, each providing the states more authority over the militia than the last. Mason's final proposal sought to provide the federal government "regulatory" authority over the militia insofar as this was necessary to establish uniformity in training and arms so that the state forces could be melded into a cohesive force when the need arose. In the states' interest, Mason proposed that this federal regulatory authority would be limited to one-tenth part of each year, that appointment of officers would be in state hands, and that the states would be exempt from federal authority whenever they needed to use their militia on state business. This, however, did not satisfy the states-rights delegates, and the matter was referred to a central committee for resolution. *The Militia, supra* note 6, at 31-35.

arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the U.S.," while concurrently "*reserving to the States* respectively the appointment of the officers, and *the authority of training the militia* according to the discipline prescribed by the U. States."[11] This compromise, with minor stylistic changes, was ultimately approved by the Convention. U.S. Const. art. I, § 8, cl. 16 (Clause 16).

Delegate Hamilton declared that the authority to appoint officers was given to the states in order to secure for them "a preponderating influence over the militia." *The Federalist No. 29*, at 185 (A. Hamilton) (J. Cooke ed. 1961) (Cooke). Moreover, the debates indicated that the training clause was retained in the text of the Constitution to ensure that the power to "organize, arm, and discipline" state forces given the federal government by the Militia Clauses did not surreptitiously extend federal control over the actual training of the militia.[12]

[11] *The Militia, supra* note 6, at 34 (emphasis added).

[12] Clause 16 provides Congress with the power to "*discipline*" the **militia and reserves** to the states "the Authority of training the Militia according to the *discipline* prescribed by Congress." Amicus curiae, the National Guard Association of the United States, argues that the term "*discipline*" provides a constitutional basis for federal control over the training process.

During the debates at the Constitutional Convention, Delegate Sherman suggested that the clause relating to training should be deleted, because he believed it "unnecessary." He believed that the states would obviously retain this authority unless they specifically ceded it to the federal government. *The Militia, supra* note 6, at 35.

In response, Delegate Elsworth cautioned Sherman on this point. Madison's notes contain the following:

> Mr. Elsworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be

While this compromise would ultimately win the approval of a majority of the states present at the Convention, many states-rights advocates believed that the plan still granted the federal government too much authority. A recurrent claim was that the proposed clause allowed the federal government to abuse its military power by sending citizens far from home for indefinite periods in furtherance of military schemes objectionable to the states.[13]

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so expounded as to include all power on the subject.

Id. After hearing Elsworth, Mr. Sherman withdrew his motion to delete the training clause. *Id.*

Moreover, the debates at the Constitutional Convention indicate the power to *discipline*, at its broadest level of interpretation, means the power to prescribe *methods* of training, *rules* of conduct for the militia, *penalties* for the violation of such rules, and the *means to administer these penalties*. This power was believed necessary to assure potential coordinated movement on the field of battle. It also assured the federal government of troops who uniformly understood military rules of conduct and who understood that they were uniformly subject to the same penalties for infraction of these rules. *See The Militia, supra* note 6, at 35; *see also Perpich v. United States Dep't. of Defense*, 666 F. Supp. 1319, 1325 n.9 (D. Minn. 1987).

[13] In a newspaper article urging the state of Maryland not to ratify the Constitution, Luther Martin, a delegate to the Federal Convention from that state, declared the proposed system would enable the government:

> wantonly to exercise power over the militia, to call out an unreasonable number from any particular state without its permission, and to march them upon and constitute them in remote and improper services. * * * In the proposed system the general government has a power not only without the consent but contrary to the will of the state government, to call out the whole of its militia, without regard to religious scruples, or any other consideration, and to continue them in the service as long as it pleases, thereby subjecting the freemen of a whole state to martial law and reducing them to the situation of slaves.

Letter of Luther Martin in The Maryland Journal, March 18, 1788, *reprinted in, The Militia, supra* note 6, at 119; *see also* Remarks of Luther Martin before the Maryland House of Representatives, November 20, 1787, *id.* at 117-118. Similar fears were also expressed at the Pennsylvania ratifying convention. *See Pennsylvania and the Federal Convention* 598 (McMaster & Stone ed.).

Supporters of the compromise, in response, assured potential opponents that the national government would only send the militia away from home in emergencies, such as when invasion or rebellion was threatened, or when there was a need to execute the laws. *See The Federalist No. 29*, Cooke at 187. In other situations, they asserted, the states and the people would assure that the federal government did not abuse its control of the militia. Hamilton emphasized that the militia were under the "preponderating influence" of the states. *Id.* at 186. Thus, he continued, "What shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them in the same feelings, sentiments, habits, and interests?" *Id.* Hamilton concluded that, if the federal government attempted to send state troops on such adventures, its action would be based not on authority granted in the Constitution but rather on "imagined intrenchments of power." He believed that the states and the people would not tolerate such clear violations of the law.[14]

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[14] Specifically, Hamilton declared that if the central government attempted such an abuse:

> whither would the militia, irritated by being called upon to undertake a distant and distressing expedition for the purpose of riveting the chains of slavery upon a part of their countrymen, direct their course, but to the seat of the tyrants who had meditated so foolish as well as so wicked a project; to crush them *in their imagined intrenchments of power*, and to make them an example of the just vengeance of an abused and incensed people?

The Federalist No. 29, Cooke at 186 (emphasis added).

Madison, in like manner, declared that the authority of the states "as coequal sovereigns," together with the political power of the people, would form a significant check on the potential use of state militias for military adventures by the federal government. He stated:

> Can we believe that a government of a federal nature, consisting of many coequal sovereigns, and particularly having one branch chosen from among the people, would drag the militia unnecessarily to an immense distance. This, sir, would be unworthy of the most arbitrary despot. They have no temptation whatever to abuse this power; such abuse could only answer the purpose of exciting the universal indignation of the people, and drawing on themselves the general hatred and detestation of their country.

3 Elliot, *supra* note 2, at 381-82.

B. The Guarantee of Republican Government Clause

The Guarantee of Republican Government Clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

During the ratification debates, many of the delegates to the state conventions feared that the federal power to suppress domestic violence in individual states provided by this clause, together with the federal power over the militia set forth in Clauses 15 and 16, posed a serious threat to the states in the form of unchecked federal military power. James Madison responded forcefully to these suggestions and, in so doing,

provided clear support for the principle that reserved state authority over the militia was designed as an explicit check on the potential abuse of military power by the federal government.

In the Virginia convention, Madison stated:

> The authority of training the militia, and appointing the officers, is reserved to the states. Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repel invasions: *these are the only cases wherein they can interfere with the militia* * * *.

3 Elliot, *supra* note 2, at 90 (emphasis added).

Several days later, Patrick Henry declared that Clauses 15 and 16, together with the Guarantee of Republican Government Clause, gave the federal government "unbounded control over the national strength" and "unequivocally relinquished" the states' control over their militias. *Id.* at 422-24. In like manner, William Grayson repeatedly argued that under the proposed Constitution, Congress could call out the militia whenever it desired and thus there was "no check" on federal control over the militia. *Id.* at 417-18, 421.

In response, Madison reasoned that practical necessities required dividing power over the militia between the federal government and the states. Following from this, he continued:

> If [power over the militia] must be divided, let him [Henry] show a better manner of doing it than that which is in the Constitution. I cannot agree with the other honorable gentleman [Grayson], that there is no check. *There is a powerful check in that paper. The state governments are to govern the militia when not called forth for general national purposes;* and the Congress is to

govern such part only as may be in the actual service of the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the Service of the United States. *It is, then, clear that the states govern them when they are not.*

Id. at 424 (emphasis added).

C. The Second Amendment

The second amendment to the Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

This amendment was intended to reassure states-rights advocates who feared that the power of a large federal standing army would diminish the "security of a free state." The second amendment guaranteed the perpetual existence of a viable militia as a continued check on the military power of the federal government. As the Supreme Court stated, *"With the obvious purpose to assure the continuation and render possible the effectiveness of [the militia] the declaration and guarantee of the Second Amendment were made. [The second amendment] must be interpreted and applied with this in view." United States v. Miller*, 307 U.S. at 178 (emphasis added).[15]

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[15] For further evidence supporting this view of the second amendment, see 1 *Annals of Congress*, 749-52, 766-67 (J. Gales, ed. 1789); 1 S. Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* App. 300 (1803); 3 J. Story, *Commentaries on the Constitution of the United States* §§ 1890-91 (1833); Note, *Should I Stay or Should I Go: The National Guard Dances to the Tune Called by Two Masters*, 39 Case W. Res. L. Rev. 165 (1988-89) (*Should I Stay or Should I Go*).

D. The Framers' View of the Interplay of the Army and Militia Powers

The Constitution provides Congress with the power "To Raise and support Armies * * *," U.S. Const. art. I, § 8, cl. 12, and the power "To make all Laws which shall be necessary and proper to carry into Execution [these powers] * * *." *Id.*, cl. 18.[16]

In terms of the militia, Clause 15 provides that Congress shall have the power:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions * * *.

Clause 16 gives Congress the further power:

To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, *reserving to the States respectively*, the Appointment of the Officers, and *the Authority of training the Militia* according to the discipline prescribed by Congress.

Id. (emphasis added).

In *The Federalist No. 23*, Alexander Hamilton discussed the scope of the Constitution's Army Clause in the following terms:

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[16] There are other references to the militia in the Constitution. Art. II, § 2, provides:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States * * *.

Amendment V provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *.

The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of **national exigencies**, or the correspondent extent and variety of the means which may be necessary to satisfy them. **The circumstances that endanger the safety of nations** are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defense.

* * * *

Whether there ought to be a Federal Government intrusted with the care of the common defence, is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to the complete execution of its trust. And unless it can be shown, that the **circumstances which may affect the public safety** are reducible within certain determinate limits; unless the contrary of this proposition can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy; that is, in any matter essential to the formation, direction or support of the NATIONAL FORCES.

The Federalist No. 23, Cooke at 147-48.

The government asserts, and the majority implicitly accepts the view, that this passage indicates the Framers believed the power to raise armies could supersede reserved state authority over the militia at will. I am unable to find a word in discussions leading to the adoption of the Militia Clause that supports this interpretation.

First, in this essay, Hamilton was writing of the "army power." There is no reference—of any kind—in *The Federalist No. 23* to the interaction of the army power with the militia power. There is no reference to the militia or to the Militia Clauses at all. Second, when Hamilton discusses the militia power in *The Federalist No. 29*, he directly contradicts the interpretation the government gives *The Federalist No. 23*.

Strange as it may now seem, the Framers feared that if the militia did not exist to protect state interests, the army might be used by the federal government to oppress the states and their citizens.[17] Thus, Hamilton, in *The Federalist No. 29* (along with Madison in *The Federalist No. 46*), declared that an essential purpose behind the states' reserved authority over the militia was to guard against the dangers of the federal army.[18]

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[17] *See supra* note 7.

[18] Specifically, Hamilton declared that a strong militia obviated the need for a potentially oppressive federal army:

> [I]f circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and in the use of arms, who stand ready to defend their own rights and those of their fellow citizens. This appears to me the only substitute that can be devised for a standing army; the best possible security against it, if it should exist.

The Federalist No. 29, Cooke at 184-85.

Next, responding to the argument that the Constitution's Militia Clauses provided the federal government the power to oppress the states with their own militias, Hamilton continued:

Hamilton *could not have meant* that the Army Clause has the power to supersede the reserved state authority over the militia at will. If the federal government could use the army power at will to make the militia a federal force under its plenary control, then the Militia Clauses could not serve their intended purpose to protect the states against potential oppression by the federal army.

Given the basic nature of this contradiction (and the fact that *The Federalist No. 23* does not even discuss the militia), it is likely that Hamilton was simply writing about the broad authority of the army power to serve the national defense, without reference to the militia power.

There is something so far fetched and so extravagant in the idea of danger from the militia, that one is at a loss to treat it with gravity or with raillery * * * . What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia, and to command its services when necessary; while the particular States are to have the *sole and exclusive appointment of the officers*? If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the Federal Government, the circumstances of the officers being in the appointment of the States ought at once to extinguish it. *There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.*

Id. at 185 (emphasis added).

In a similar vein, Madison wrote:

Let a regular army, fully equal to the resources of the country be formed; and *let it be entirely at the devotion of the Federal Government*; still it would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger * * * . To these [a standing army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

The Federalist No. 46, Cooke at 321 (emphasis added).

Alternatively, *The Federalist Nos. 23 and 29* can be read together to allow the army power to supersede the militia power in more tightly confined circumstances. Hamilton, in *The Federalist No. 23*, speaks of the broad and unhindered sweep of the army power very clearly in the context of unforeseeable *"national exigencies,"* or, phrased in other ways, in terms of the *"circumstances that endanger the safety of nations,"* or *"circumstances which may affect the public safety."* Clearly, these phrases are significant to Hamilton, and by reading such a "national exigency" as a necessary requirement before the Army Clause can supersede state authority over the militia in peacetime, the seemingly contradictory messages of *The Federalist No. 23* and *The Federalist Nos. 29 and 46* are harmonized.

If the authority of the Army Clause to supersede the reservation of state authority in the Militia Clauses is limited to "national exigencies" or "circumstances that endanger the safety of the nation," federal power over the militia can only "trump" the state power when the whole union, or the national interest, is in some way threatened. If such a threat did not exist, the states would then be protected from the oppressive exercise of federal authority by the Militia Clauses.

Certain powers, such as reserved state authority over the militia, were enumerated in the Constitution in order to be insulated from uncontrolled and potentially irresponsible short-term political reaction. Such powers represented fundamental structural decisions by the Framers, based on their view of political society. They realized that, unless insulated, these powers could be eliminated in the heat of the moment by ill-considered political reactions. *See The Federalist No. 10* (J. Madison).

III. *The Text of the Constitution*

The plain language of Article I, Section 8, Clause 16 of the Constitution *"reserv[es] to the States respectively * * * the*

Authority of Training the Militia * * *." This is an unambiguous command in the text of the Constitution which we cannot ignore. The second amendment to the Constitution provides that, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms is not infringed." This amendment mandated the states to keep troops as a check on the power of the federal government as a matter of constitutional law. *United States v. Miller*, 307 U.S. at 178; *see also, Should I Stay or Should I Go, supra* note 15 at 176, 203. When read together with Clause 16, the second amendment clearly opposes the power of Congress to raise armies at will. The clauses, however, can be readily harmonized if we accept the concept that the power of Congress over the National Guard is supreme only in times of war or a declared national emergency.

IV. *The Decided Cases*

A. The Supreme Court

The majority reads the *Selective Draft Law Cases, supra*, and *Coz v. Wood*, 247 U.S. 3 (1918), to permit, if not to require, its holding. I find no support for the majority's view in these cases.

The Selective Draft Law of May 18, 1917, ch. 15, 40 Stat. 76, was passed shortly after Congress had declared war on Germany. The act unambiguously recites that the country was faced with an "emergency, which demands the raising of troops in addition to those now available." 40 Stat. at 76.[19]

[19] The draft was specified to be in accordance with Section 111 of the National Defense Act of 1916. That section read as follows:

> When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, * * * draft into the military service of the United States, *to serve therein for the period of the war unless sooner discharged*, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct.

The United States, in its brief to the Supreme Court, made it clear that it was discussing the authority of Congress to draft members of the militia in wartime. It stated:

> In an able article in 30 Harv. Law Rev., 712, Maj. S. T. Ansell (now Brigadier General and Acting Judge Advocate General) states (p. 715):
>
> > Throughout our history the States have recognized the feasibility of parting with their organized militia *when a national crisis has demanded it.* In the Civil War the States parted first with their active militia in raising their quotas for the Federal Army, and the State organizations with their members became, when mustered into the service, United States Volunteers. The same thing prevailed in the confederacy during that period. In the war with Spain the Volunteer Army was raised in the same manner. Of course, in contemplation of law the militia has been taken not as militia, nor as militia organizations, but as individuals owing the Nation allegiance and service. Such a long-continued course of governmental conduct is not without significance.
>
> The Article concludes with the following adequate language (p. 723):
>
> > A militiaman, organized or unorganized, is a citizen. Concededly an unorganized, or reserve, militiaman is subject to draft; otherwise, since all arms-bearing citizens are such militia, whence shall our armies come? *An organized militiaman is no less a citizen and is much better prepared, largely at Federal expense, to make an effectual contribution to the country's cause in time of war.*

Selective Draft Law Cases, Brief for the United States at 59-60 (emphasis added).

In the *Selective Draft Law Cases*, the Court concluded:

> [T]he possession of authority to enact the statute must be found in the clauses of the Constitution giving Con-

> gress power "*to declare war;* . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces." Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article I, § 8.

245 U.S. at 377 (emphasis added).

The Supreme Court held that the conscription statute passed under the powers to declare war and to raise and support armies, together with all the other military powers available to the federal government, gave the federal government authority to conscript male citizens. Further, it held that this authority was not limited by the states' reserved authority over the militia. The Court's holding was succinctly summarized four months later in another opinion, on a closely related issue. Chief Justice White wrote:

> [O]n the face of the opinion delivered [in the *Selective Draft Law Cases*] the constitutional power of Congress to compel military service * * * was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution *to declare war* and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of *the war power* to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced

> from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority *to declare war* and raise armies, and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of *the war power*, wholly incidental if not irrelevant and subordinate, provision concerning the militia, found in the Constitution.

Cox v. Wood, 247 U.S. at 6 (emphasis added).

Neither of the cases supports the majority's opinion. The Court simply declared that in war the federal government can use *all* its military powers combined to supersede the states' reserved authority over the militia.

The *Selective Draft Law Cases* are also distinguishable because the conscription statute at issue drafted the members of the National Guard (militia) into the army as *citizens*, not as *militiamen*. For this reason, the government argued that the power to draft *citizens* in no way infringed upon the reserved rights of the states over the *militia*, and thus the Court did not have to reach the militia clause arguments. *See Selective Draft Law Cases*, 62 L.Ed. 349, 352 (1918) (summary of oral argument). *See also* Friedman, *supra* note 2, at 1496 and Comment, *supra* note 2, at 624 & n.157.[20]

The language in the *Selective Draft Law Cases* concerning the interplay of the army and militia powers begins with the

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[20] *But see Thoughts on the Conscription Law of the United States*, in *The Military Draft: Selected Readings on the Constitution* 207-18 (M. Andresen ed. 1982) (draft opinion found in the papers of Chief Justice Taney finding that federal conscription law directed toward citizens, as opposed to militiamen, implicated (and in fact violated) the Militia Clauses of the Constitution); Freeman, *The Constitutionality of Peacetime Conscription*, 31 Va. L. Rev. 40 (1944).

Court noting that an improved understanding of the scope of these provisions can be gained by comparing the powers of the federal government before and after the Constitution was ratified. Under the Articles of Confederation, Congress had the right "to call on the states for forces." 245 U.S. at 382. Correspondingly, the states had an inescapable duty to furnish troops when called. This "embraced the complete power of government over the subject." *Id.* The Court analogized this power to the authority to raise armies under the Constitution.

Following immediately on the heels of this description of "the army sphere," however, *the Court explicitly cautioned that this power was not controlling over the states. Rather, its use was confined to those "exigencies" in which Congress, in its discretion, saw fit to use the power.*[21]

The Court stated:

> *But the duty of exerting the power thus conferred in all its plentitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play.*

Id. at 382-83 (emphasis added).

The Court then continued its comparison of the Articles of Confederation to the Constitution. Under the Articles, the Court declared, there was an open area of authority that, in the absence of the proper exercise of the power to raise armies, left the states with control over the militia. This control was, in the Court's view, analogous to the authority reserved to the states under the militia provisions of the Constitution.

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[21] Chief Justice White, four months later, in *Cox*, clarified that his holding in the *Selective Draft Law Cases* was based on the authority of the war and army powers exercised together.

The Court next explained that the Militia Clauses also provided further positive powers to Congress. The Court noted that Clause 15 allowed Congress to make use of the militia when insurrection or invasion was threatened and to execute the laws. Clause 16 also provided Congress with some power over the organization and training of state militias. The Court carefully declared, however, that *the Militia Clause left the specific "carrying out of" (i.e., the specific authority over) the organization and training of the militia to the states. Id.* at 383 (emphasis added).

The Court found that these "fine-tuned" powers given to Congress in the Militia Clauses were created to "diminish" or limit the use of the awesome army power—and its attendant dominance over state authority—to those situations in which the exercise of such vast power was *strictly necessary. Id.* at 383.

In concluding, the Court emphasized the care required in interpreting the conflicting authority of the army and militia provisions of the Constitution. It was true, said the Court, that the Militia Clauses provided Congress other ways, in addition to the Army Clause, to exert power over the militia. These other grants of positive authority, however, did not diminish the strength of the army power which, *once properly exerted*—or in the Court's words, exerted *"only as in the discretion of Congress it was deemed the public interest required"*—was "complete and dominant." *Id.* at 383-84 (emphasis added).

Following from this, the Court found that the army power, when properly exercised, could "potentially" narrow the power of the Militia Clauses. There was no suggestion, however, that, absent an exigency, the integrity of the Militia Clauses could be compromised. The Court carefully emphasized that the army and militia powers were "distinct and separate,"

that both comprised meaningful areas of authority, and that neither area was to be "weakened or destroyed" by construing the other power too broadly. *Id.* at 384.[22]

B. The Lower Federal Courts

The majority cites two cases, *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969), and *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968), in support of its view that the Montgomery Amendment is constitutional as a necessary and proper exercise of Congress' army power. I doubt the validity of this view. *Johnson* and *Drifka* both arose during the Vietnam War where there was a declaration of national exigency.

In *Johnson*, National Guardsmen challenged the constitutionality of Pub. L. No. 89-687, 80 Stat. 981 (1966). This statute, enacted in the midst of the Vietnam War, provided the President with temporary authority, based upon a determination of presidential necessity, to order a member of the National Guard of the United States to active duty for up to 24 months.

The Guardsmen alleged, *inter alia*, that the statute violated Clause 15. Specifically, they asserted that, because the duty did not fall within the powers granted Congress in that clause (i.e., the duty did not involve insurrection, invasion, or the need to execute the laws), the statute was unconstitutional.

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[22] The Supreme Court has held that other constitutional provisions operate as a limit on Congress in military affairs. *See Rostker v. Goldberg*, 453 U.S. 57 (1981) (army power must be used in manner consistent with the equal protection guarantees of the fifth amendment); *Gillette v. United States*, 401 U.S. 437 (1971) (army power must accommodate the establishment clause of the first amendment); *United States v. O'Brien*, 391 U.S. 367 (1968) (army power must accommodate first amendment free speech). Furthermore, the Supreme Court specifically stated that Congress' power to declare war and to support armies is not plenary, *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919), but is subject to other applicable constitutional limitations.

The Court responded to this claim by stating that Pub. L. No. 89-687 was not enacted under the authority of Clause 15, but rather under the dual enlistment system which was based on the army power and the Necessary and Proper Clause.

Congress, two years prior to the enactment of Pub. L. No. 89-687, had declared the presence of a "national exigency" in the "Gulf of Tonkin Resolution." *See* Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964). In this resolution, Congress specifically found that the "deliberate and repeated" attacks on United States naval vessels in Southeast Asian waters "created a serious threat to international peace." It further declared that the "United States regards as *vital to its national interest* * * * the maintenance of international peace and security in southeast Asia." Therefore, the Congress declared its readiness, "[c]onsonant with the Constitution of the United States * * * , as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." *Id.* This statement of exigency, together with the exercise of the congressional powers to raise armies and to make laws under the Necessary and Proper Clause, provides a constitutional basis for Pub. L. No. 89-687.[23]

The *Johnson* court indirectly acknowledged that Pub. L. No. 89-687 was motivated by a threat to the national security. The Court stated that the "purpose" of the law was to make National Guard troops available to the federal government *when the "national security" was threatened.* 414 F.2d at 1063-64.

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[23] *Drifka* adopted a rationale similar to that stated in *Johnson*. 294 F. Supp. at 427-28.

V. *The National Exigency Requirement*

Like the Supreme Court in the *Selective Draft Law Cases*, this Court is now faced with the interplay of two constitutional provisions which have the potential to conflict in their exercise. Both have power and purpose, and thus in harmonizing these provisions, we must attempt to preserve as much of the authority of each as we sensibly can.

If the federal government can make the militia a federal force at will, the militia's intended purpose as a check on federal military power will be frustrated.[24] Moreover, the

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[24] The United States District Court for the District of Massachusetts similarly found that the government's position concerning the power of the Army Clause leads to the "abolition" of the militia by leaving the Militia Clauses of the Constitution without practical application. Specifically, the court stated:

> Counsel for the defendants conceded at oral argument that [its] conception of the dual-enlistment system makes the militia dependent on Congress for its existence because, in a practical sense at least, the militia exists only when Congress does not want or need it as a part of the Army. Under such a dual-enlistment concept, pushed to the logical limit, Congress could at any time order the entire militia into active duty year-round, thus abolishing the militia and leaving the Militia Clause without practical application. A plain reading of the Constitution support plaintiffs' contention that Congress cannot "abolish" the militia by transforming it into a part of the Army. *See* U.S. Const. amend. II ("A well regulated militia being necessary to the security of a free State . . .); Militia Clause, *supra*, ("reserving to the States respectively . . . the Authority of Training the Militia according to the discipline prescribed by Congress).

Dukakis v. Dept. of Defense, 686 F. Supp. 30, 36 (D. Mass.), *aff'd*, 859 F.2d 1066 (1st Cir.), *cert. denied*, 109 S. Ct. 1743 (1988).

In order to avoid these problems, the court departed from the government's position and distinguished the *Selective Draft Law Cases* from the present controversy concerning the Montgomery Amendment by noting that the Selective Draft Law controversy arose in wartime. Thus, according to the court, it followed that the "present controversy presents the issue of accommodation between the Armies Clause and the Militia Clause in a context less

Framers' intent—particularly in light of the structure of the Militia Clauses—cannot be fairly read to support plenary federal control of the militia, absent a threat to the national security.

The majority declares that, under the Army Clause, the federal government can make the militia a federal force at will. It says that it can do this because the militia has been changed into: (1) the National Guard, and (2) the National Guard of the United States (NGUS). Thus, the majority argues that when the militia is ordered to put on its NGUS hat, it is available to the federal government any time the federal government wants, to do anything the federal government desires.

This cannot be right.

A power that the Constitution explicitly enumerates as a state power—a state power designed to check federal power and to protect the states from the exertion of federal power—cannot through "a mere form of words" be transformed into an unchecked instrumentality of federal power.

Based on these considerations, I conclude, as did the Court in the *Selective Draft Law Cases*, that before the federal

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compelling than that of *Selective Draft Law Cases*, for priority of the Armies Clause." *Id.*

While all this appears clear—and consistent with this dissent—the *Dukakis* court concluded: "Nevertheless, guided by the decisions in the dual-enlistment cases as well as that of *Selective Draft Law Cases*," the states' reserved authority in the Militia Clauses "does not *override* the legitimately exercised power of Congress '[t]o raise and support Armies.'" *Id.* (emphasis added).

The *Dukakis* court acknowledged that if the Militia Clauses are to have any continuing meaning, there must be a line of reserved state authority over which the federal government cannot cross. However, the court neither explained where that line is nor why it believed the Montgomery Amendment falls on the permissible side of that line.

government can exercise its army power to supersede the reserved state authority over the militia, its actions must be motivated by a "national exigency."

Implied in this requirement, to assure its observance, is the necessity of an affirmative declaration. Thus, before the legislative or executive branch can use the authority of the Army Clause to overcome reserved state authority over the National Guard, Congress or the President must first affirmatively assert the existence of a national exigency or of a specific threat to the national security.

The power to determine the existence of such circumstances belongs only to Congress or the President. Once this power is exercised, the substance of the determination cannot be challenged by the states or by individual National Guard members sent into federal service. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827). Such a challenge would involve a central "political question," *see Baker v. Carr*, 369 U.S. 186, 213, 217 (1962), and would hence not be justiciable.

It might be argued that the necessity of an affirmative declaration is thus meaningless. I believe, however, it is a serious undertaking for the President or for Congress to declare a national emergency. Such a declaration alerts the coordinate branches of government, the states, the citizens of the nation, and the nations of the world that the United States believes its interests are threatened and that it is prepared to take appropriate steps. It may at times be politically distasteful to an incumbent administration or to Congress to declare a national emergency, but ours is an open society and experience teaches that in matters of great import, support of the citizenry is essential.

VI. *From the Militia to the National Guard*

Over the last eighty-five years, the federal government has gradually assumed greater control over the state militias.

Congress has, however, consistently recognized the constitutional limits on its power to call the state National Guards into active service for training or operational missions in peacetime without gubernatorial consent. The Montgomery Amendment represents the first congressional departure from this recognition.

A. The Dick Act of 1903

After the poor performance of state militia in the Spanish-American War, Congress began to use its Clause 16 power to "organize, arm and discipline" the militia, together with federal funds to improve the organization and coordinate the training of state militias. Thus, after 111 years, during which the national militia laws had been relatively unchanged,[25] Congress in 1903 passed the "Dick Act." Act of January 21, 1903, ch. 196, 32 Stat. 775. This law renamed the organized militias of the states the "National Guard" and provided federal funds to equip and to train them with regular army officers. This aid was conditional, however, on compliance with federal standards for training and organization.

The Dick Act carefully observed basic state authority over the National Guard. In this light, the War Department could not issue additional arms or assign regular army officers to state National Guard units until the state governor explicitly requested such assistance. 32 Stat. at 777. Similarly, National Guard units could not engage in joint encampments, maneuvers or field instruction with regular troops during summer training unless the governor made a formal request for such training. 32 Stat at 777-78.

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[25] The Uniform Militia Act of 1792, ch. 33, 1 Stat. 271, remained the primary law regulating the militia until 1903. For congressional activity between 1792 and 1903, *see Should I Stay or Should I Go*, *supra* note 15 at 179-185.

B. The National Defense Act of 1916

The National Defense Act of 1916, ch. 134, 39 Stat. 166 (the 1916 Act), continued the use of federal funds as an inducement to further federal "organizational" control over state National Guards. The 1916 Act also recognized the constitutional limits on federal control over state National Guard forces by providing that "nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace * * *." 39 Stat. at 198 (codified at 32 U.S.C. § 109(b)). It also declared that sentences of dismissal or dishonorable discharge from the National Guard must be approved by the governors of the respective states. 39 Stat. at 209.

C. The National Defense Act Amendments of 1933

At the outset of World War I, it was believed that the Militia Clauses might prevent National Guard units from being called into federal service outside of the categories listed in Clause 15. Thus, volunteer units with high morale, which had trained together and were in a relatively high state of readiness, were disbanded when the war began. The government then drafted the individual members of these units into the Army, where they were reassigned to new units. This process not only hurt National Guard morale but was viewed as bad federal defense policy, given that trained units are generally in short supply at the beginning of crisis periods.

The 1933 amendments were primarily designed to remedy this problem by allowing the federal government to mobilize National Guard units intact "so as to eliminate the delay incident to draft." S. Rep. No. 135, 73rd Cong., 1st Sess. 2 (1933); *see also* H.R. Rep. No. 141, 73rd Cong., 1st Sess. 2 (1933). To accomplish this objective, Congress created the

"dual enlistment" concept. Dual enlistment required the members of state National Guards to be concurrent members in a new entity called the National Guard of the United States (NGUS). The NGUS was a reserve component of the United States Army created under the authority of the Army Clause.

Based on this dual status, the 1933 amendments gave the President power to order the National Guard in its army status as the NGUS into federal service, *but only in the event of a "national emergency" declared by Congress*. In this light, the accompanying Senate report states that the "control, officering, and discipline [of the National Guard] except when ordered out pursuant to an emergency declared by Congress, [is left] with the respective States, just as at present. The relation of the Guard to the respective states during peace is in nowise affected or altered." S. Rep. No. 135 at 2. According to the House report, the 1933 amendments "reserv[ed] to the States their right to control the National Guard or the Organized Militia *absolutely* under the militia clause of the Constitution in time of peace." H.R. Rep. No. 141 at 5 (emphasis added).

Thus, contrary to the majority's view, the 1933 amendments did not change the degree of federal control over the National Guard but merely codified the existence of preeminent federal power in a national emergency or exigency. Acknowledging the limited change in federal control over the Guard affected by the 1933 changes, one federal district court has declared that the "National Guard, while something of a hybrid under both state and federal control, is basically a state organization." *Mela v. Callaway*, 378 F. Supp. 25, 28 (S.D.N.Y. 1974); *see also Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46, *vacated on other grounds*, 382 U.S. 159 (1965) ("The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution.").

The 1933 amendments recognized that federal authority over the National Guard in a national emergency is pre-eminent. In such a narrow circumstance, state authority is superseded, and thus there are no state limitations to avoid. The dual enlistment system was not a clever ploy by Congress to avoid at will the state powers embodied in the Militia Clauses. Rather, it was simply the statutory recognition of the constitutional principle that federal authority was supreme over the National Guard in national emergencies.

D. The Armed Forces Reserve Act of 1952

The declared purpose of the Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 (the 1952 Act), was to bring together in one statute the laws relating to the reserve components of the various branches of the armed forces. *See Should I Stay or Should I Go, supra* note 15, at 193. Section 233 of the 1952 Act for the first time relied on the Army Clause powers of the Constitution to bring national guardsmen into federal service for training. The 1952 Act, however, specifically required that the federal authority requesting National Guard participation first obtain the consent of the relevant state governor.

Relevant to the present case are two provisions of the 1952 Act, now codified at 10 U.S.C. § 672(b) and (d). These subsections provide the federal government with authority to call state guardsmen to active duty with *the consent of their state governors.* Federal training of state National Guard troops is done under the authority of these provisions. The provisions state:

> (b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member assigned to a unit organized to serve as a unit, in an active status in

> a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. *However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State* * * *.*
>
> (d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. *However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State* * * *.*

10 U.S.C. §672 (emphasis added).

If the gubernatorial consent requirement in these statutes were to be eliminated, the federal government would have plenary power to put the National Guard under its control at any time and for any purpose. Such a state of affairs would clearly frustrate the reserved state authority over the militia contemplated by the Constitution, particularly by the Militia Training Clause.

In this light, the United States Military Court of Appeals has found that the gubernatorial consent requirement of 10 U.S.C. § 672(d) "has constitutional underpinnings in Art. I, § 8 of the Constitution of the United States." *United States v. Peel,* 4 M.J. 28, 29 (C.M.A. 1977) (footnote omitted); *accord United States v. Self,* 13 M.J. 132, 135 (C.M.A. 1982); *United States v. Hudson,* 5 M.J. 413, 418 (C.M.A. 1978). Moreover, although we owe no special deference to congressional judgments regarding constitutional questions, the available

evidence indicates that Congress included the gubernatorial consent requirements in these provisions specifically to avoid potential conflict with reserved state authority.[26]

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[26] Draft versions of the legislation that would become the 1952 Act provided that National Guard units could be ordered to active duty outside of the situations enumerated in Clause 15 or the declaration of a national emergency without first obtaining the consent of the relevant state governors. In response, witnesses who believed that such federal power violated the Militia Clauses filed "voluminous comments" with the Senate Armed Services Committee. *See Reserve Components: Hearings on H.R. 4860 Before the Committee on Armed Services*, 82d Cong., 1st Sess. 473 (1951).

Specifically, General Ellard A. Walsh, a distinguished Minnesotan and spokesman for the National Guard Association, declared that a proposed bill without the gubernatorial consent requirement:

> concentrat[ed] too much power in the Executive and too much authority in the Department of Defense, and would in a number of instances infringe not only on the authority of the sovereign states but of the Congress as well.

Id. at 483.

Walsh maintained the bill without the gubernatorial consent provisions:

> very definitely violates the provisions contained in the militia clauses of the Federal Constitution, and notably article I, section 8, clause 16 thereof, which reserves to the states the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress.

Id. at 476, 482.

Such an arrangement, Walsh argued, would disrupt the basic constitutional principle that the Guard must be "responsive to the orders of the governor." *Id.* at 478.

Congress was also flooded with letters from state National Guard officials who pointed to the Militia Clause requirement for divided federal-state authority. Ernest Vandiver, Adjutant General for the State of Georgia, complained that the proposed bill "will delegate to the Pentagon the constitutional rights and powers imposed in the governors of the respective States to command their militia." *Armed Forces Reserve Act: Hearings on H.R. 5426 Before the Senate Subcommittee on Armed Services*, 82d Cong., 2d Sess. 312 (1952). The Adjutant General of Illinois, Leo M.

E. The Montgomery Amendment of 1986.

In 1986, the Governor of Maine refused to allow 48 members of the Maine National Guard to participate in a training mission in Honduras. After several other governors threatened to follow suit, a Senate subcommittee began to explore the question of whether the gubernatorial consent provisions of the 1952 Act should be abolished. *See Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower & Personnel of the Senate Committee on Armed Services*, 99th Cong., 2d Sess. (1986) (stenographic transcript) (1986 Senate Hearings). The hearings were held with short notice, and many who wished to testify against the proposal were unable to do so. 1986 Senate Hearings, *supra*, at 8. Among the governors objecting to this legislation were Gov. John H. Sununu, now President Bush's Chief of Staff, Gov. Thomas H. Kean (New Jersey), Gov. Mark White (Texas), Gov. Harry Hughes (Maryland), Gov. Victor Atiyeh (Oregon), Gov. James R. Thompson (Illinois), Gov. George Nigh (Oklahoma), Gov. Bill Allain (Mississippi), Gov. Norman H. Bangerter (Utah), Gov. Ed. Herschler (Wyoming), Gov. Richard D. Lamm (Colorado), Gov. Mario Cuomo (New

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Boyle, enclosed his prepared remarks protesting a prior proposal to "federalize" the National Guard. "I support the wisdom and farsightedness of our forefathers and the framers of the Constitution when they wrote the militia clause of the Constitution," Boyle wrote. "The National Guard system comprising as it does—citizen soldiers—has always been a bulwark against the concentration of military power in our Federal Government." *Id.* at 310.

Thus, it appears that to counter the perceived "federalization" of the Guard, the National Guard Association proposed, among other things, an amendment requiring the consent of the governor of the State concerned before National Guard units could be called to active duty outside of national emergencies or the contingencies noted in Clause 15. Congress listened and enacted the gubernatorial consent provisions, 10 U.S.C. § 672(b) and (d).

York), Gov. William A. O'Neill (Connecticut), Gov. Gerald L. Baliles (Virginia), Gov. Madeline M. Kunin (Vermont), Gov. Bruce Babbitt (Arizona), Gov. John Carlin (Kansas), Gov. William J. Janklow (South Dakota), Gov. George A. Sinner (North Dakota), Gov. Arch A. Moore, Jr. (West Virginia), Gov. James J. Blanchard (Michigan), and Gov. Juan Luis (Virgin Islands).

Former Gov. Sununu stated:

> I want to go on record as opposed to * * * any legislative attempt to remove the authority or control of the National Guard from the states. This legislative initiative is directly contrary to the language and intent of the U.S. Constitution.
>
> The National Guard, for over 200 years, has responded wherever and whenever our nation called. With gubernatorial control of the National Guard in peacetime, the nation has always had full confidence in the availability of this reserve force for war or national emergency. There is no evidence * * * that there is any less commitment to that responsibility today. The President will always have the prerogative, by federal statute, to call the National Guard in time of war or national emergency.

Comments of Governor John H. Sununu, entered into record of *Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services*, 99th Cong., 2d Sess. (July 15, 1986).

The Department of Defense had counseled caution and hoped the crisis would fade over time.[27] In the end, the subcommittee took no action.

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[27] *See* Kester, *State Governors and the Federal National Guard* 11 Harv. J. L. & Pub. Policy 177, 179 (1988).

One month later, Rep. G.V. "Sonny" Montgomery of Mississippi submitted an amendment to the proposed Defense Authorization Act of 1987 that provided that a governor could not withhold his consent with regard to active duty outside the United States because of objections to the location, purpose or scheduling of the mission. *See* Cong. Rec. H6267 (daily ed. Aug. 14, 1986). Because the proposal took the form of an amendment to the defense bill, debate on it in the House of Representatives was limited to a total of ten minutes. Moreover, there were no hearings on the amendment before it reached the floor for a vote. In response, many representatives noted the fundamental impropriety in making such a great potential change in defense policy—if not in the constitutional balance of power—without the benefit of hearings, *id.* at H6262-68 (remarks of Reps. Edwards and Schroeder), and with such limited debate.[28] The consideration of the bill was further overshadowed by ominous recurring warnings to the representatives that if they did not act quickly to eliminate the gubernatorial consent requirement, the fed-

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[28] With regard to the limited debate concerning the Montgomery Amendment, Rep. Dyson stated:

> Mr. Chairman, the Guard has no greater friend than the Gentleman from Mississippi [Mr. Montgomery], but I think this is a bad idea. We have not had enough time to look into this; 10 minutes per amendment is not enough time to fully understand a proposal as important and as far reaching as this amendment.

Cong. Rec. H6266 (daily ed. Aug. 14, 1986).

Rep. Schroeder stated:

> Basically, whether you agree or disagree, I think we all agree that if [the Montgomery Amendment] is unconstitutional according to many constitutional scholars, and if we have never had hearings, and if it has been functioning this way for over 200 years, why in the world the rush to put this in with a 10-minute debate on the House floor?
>
> I think that is playing too fast and loose.

Id. at H6267.

eral government would eliminate funding to their state National Guards.[58]

In the end, calls for deliberation and caution did not prevail, and the full House, after 10 minutes of debate, approved the Montgomery Amendment 261-159. At conference, the Senate defense bill did not contain the proposed amendment. The conferees, however, made one technical change in the House version and included a notation on legislative intent that allowed the governors to withhold consent if they needed the Guard for local emergencies.[59]

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[58] For example, Rep. Montgomery warned the members of the House:

> If we do not adopt this amendment, and as I have said earlier, the National Guard is dead in the water; you can forget about it. You Governors are going to lose all your equipment; you are going to lose a lot of payroll, so you had better support this amendment and let the Guard keep going.

Cong. Rec., *supra* note 28, at H6267.

Moreover, on July 15, 1986, James H. Webb, Jr. told a Senate Armed Services Subcommittee that an alternative to retaining the gubernatorial consent requirement was "to give the fullest resourcing * * * to those units that are able to participate in 'real world' training missions * * *." Prepared statement of Assistant Secretary of Defense for Reserve Affairs, *see* 1986 Senate Hearings, *supra*, at 5-14. Ten days later, on July 25, 1986, the House Committee on Armed Services strongly urged the chief of the National Guard Bureau to consider withholding funds from states that refused to participate in overseas training assignments. H.R. Rep. No. 718, 99th Cong., 2d Sess. 176 (1986).

[59] Specifically, the conference report stated:

> The conferees reiterate that under this provision, the governor still will have the authority to block the training if he or she thinks the guardsmen are needed at home for local emergencies. The conferees intend that nothing about the words "location, purpose, type, and schedule" should constrain a governor in according appropriate priority to a state or local emergency, such as a flood or other natural disaster.

Legislative History of Pub. L. No. 99-661, 99th Cong., 2d Sess. 475 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 6413, 6534.

The effect of this amendment is to give the Defense Department unfettered authority over the state National Guard units. It permits the Department to call out the individual National Guard units for training or operational missions in peacetime and to do so in the face of objections on the part of the governor of the affected state. I believe that the Montgomery Amendment contravenes the intent of the Framers. It allows the federal government to make state National Guards part of a federal force in peacetime at will. It eliminates all check on federal military power by the states and frustrates state authority to resist operational and training missions of the National Guard when there is no threat to the national security and when no emergency has been declared. From time to time over the past 200 years, the Congress of the United States has taken steps to improve the effectiveness of the National Guard. Until 1986, however, it always recognized the restraint of the Militia Clauses of the United States Constitution.

Not only is the Montgomery Amendment contrary to the intent of the Framers, but it ignores the plain words of the Constitution, the decisions of the United States Supreme Court, and the decisions of the lower courts. Until *Dukakis* and *Perpich* were decided by the federal district courts, no federal court had held that Congress had the power under the Constitution to authorize the Defense Department to call out the National Guard in peacetime absent the declaration of an emergency. Every other case has involved a situation in which the Guard was called out in wartime or at a time when a national emergency had been declared.

VII. *Policy Arguments*

The government argues that the Framers could not have foreseen the degree of dependence that the United States has

placed on National Guard troops. If they had, the argument goes on, they would never have intended the states to possess the veto power given them in the 1952 Act. Thus, the government asserts that the gubernatorial consent requirement allows the states to participate in defense and foreign policy decisions in ways the Framers never would have sanctioned.

In response, the Framers made a conscious decision to place the bulk of the nation's defensive forces in the hands of state troops. Through much of American history, a large percentage of the nation's defensive forces have been organized in the form of militia or state National Guards. *See supra* note 3. Until 1986, state authority over these forces had been almost entirely unchanged by Congress. While it is true that the Framers did not want the states to make positive national defense or foreign policy, they did intend the states to be a check on potential abuse of military power by the federal government. In this light, the gubernatorial veto requirement of the 1952 Act is a particularly apt legislative adaptation of a constitutional concept.

The government argues that the Montgomery Amendment is necessary to ensure an effective national defense. However, it provides *no* evidence that the effectiveness of the national defense or of the National Guard will be diminished by an adherence to the constitutional principle of basic state control over the National Guard forces, absent a declaration of war or of national exigency.

In the last fifteen years, the National Guard has become a major part of the defensive force of the United States. After the Vietnam War and the presidential action discontinuing selective service registration, Congress decided to decrease the size of the standing military and to place increased reliance on reserve components, particularly on the National

Guard. In this "Total Force" concept, the reserve components became major participants in the national defense effort.

The government maintains that the modern world has grown far more complex and dangerous than it was in 1787. The armed forces of the United States must today be able to respond rapidly to a broader range of potential threats to the national security than the Framers could have ever envisioned. Thus, the government argues, state-based limitations on federal control embodied in the Militia Clauses applied to a different time and different circumstances. The necessities of the modern world require this Court to act "pragmatically" and to read these anachronistic reserved powers either very narrowly or out of existence entirely.

The figures that the majority cites show that the National Guard is a major part of the defensive force of the United States. However, if the national security is in any way threatened, the federal government can quickly assume total control over the National Guard by declaring a national exigency. Thus, in any situation demanding quick action, there would be no state-controlled obstacles to hinder the government's response.

The government's second pragmatic argument follows closely from the first Secretary Webb, in his Senate testimony, explains that, because of the nation's great dependence on the National Guard, these forces must be extremely well trained. This is necessary both so that they are prepared for all future emergencies and so that, at the appropriate time, they can mesh their operation with the regular army and other reserve components. *See* 1986 Senate Hearings, *supra*, at 56-6-8. Specifically, Secretary Webb asserts that the National Guard units must train in foreign environments with their unusual climates and terrain, alongside their full-time army and air

force counterparts, in order to achieve "operational readiness." Any interference by obstinate state governors in this training process is likely to be disastrous in terms of the Guard's ability to operate effectively in a future crisis.

In response, all of the parties to this case agree that broad training experience for the National Guard is essential to the adequate defense of the United States. Indeed, even in the midst of the Honduran training controversy in 1986, Lieutenant General E. H. Walker, Chief of the National Guard Bureau,[31] stated:

> [N]o governor has said he opposes overseas deployment training—all have said they wholeheartedly believe in it and understand and support the need for it.

1986 Senate Hearings, *supra*, at 95-5.

Since the Guard began training overseas in the early 1970's, no governor has ever withheld his or her consent to a training mission or any type of mission—until the National Guard began to train in Honduras. Moreover, states have never opposed training on the basis of terrain or climate. They have never opposed Guard exercises coordinated with regular forces. In short, they have never opposed the substance or content of training—nor are they likely to do so in the future. The states have only opposed an order for training when the real purpose of the order is something more than training.

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[31] 10 U.S.C. § 3040 provides:

> (a) There is a National Guard Bureau, which is a Joint Bureau of the Department of the Army and the Department of the Air Force, headed by a chief who is an adviser to the Army Chief of Staff and the Air Force Chief of Staff on National Guard matters. The National Guard Bureau is the channel of communications between the departments concerned and the several States, Territories, Puerto Rico, the Canal Zone and the District of Columbia on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States.

In the case of the Honduran controversy, the state objections all concerned the potentially dangerous implications that training in a politically explosive part of the world might have.[32]

In this light, the substance of the government's training argument is better understood. The government does not argue that gubernatorial consent prevents it from exposing Guardsmen to a proper diversity of climate or terrain or that it prevents Guardsmen from training alongside their full-time army and air force counterparts. This could be easily done in non-controversial areas of the world, as it has in the past. The real essence of the government's argument must then be that the National Guard must train in areas of extreme political tension if it is to be an effective fighting force.[33] This

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[32] As Senator Glenn stated at the hearings:

> I know back in my own state of Ohio this question came up, why Honduras and why now? I think we ought to face that. That is the reason we are up against this thing now. Normally, we train in Panama—we have done that for a decade and a half or so—to give them jungle training.
>
> The issue we have to address here and we have only touched on it peripherally is why Honduras? I think the concept, the view of many of the governors, is that we are looking for [political] support for a policy that all Americans do not agree with by sending people to Honduras.
>
> I am being blunt about that, but that is the fact. That has been editorialized across the country. That is the issue here really. Does the training have to be in Honduras?
>
> When they were being ordered down to Honduras, it was the very time there were border crossings, with reports of several hundred people being killed. The governor had the National Guard there when the perception was that we are sending our people into the combat zone. That was the public perception.

1986 Senate Hearings, *supra*, at 23.

[33] General La Vern E. Weber (Retired), former Chief of the National Guard Bureau, discussed the government's position in his testimony to the Senate Subcommittee:

> I submit to you that such deployments are highly desirable, but not absolutely necessary to achieve combat readiness levels.
>
> National Guard units can be trained to Federal standards of

could be the case, but the government has presented *no* evidence to support this argument.

Moreover, if the Honduran training controversy is a prototype of the dangers this country faces in the absence of the Montgomery Amendment, the following is of some interest. General La Vern E. Weber (Retired), former Chief of the National Guard Bureau, noted that the Honduran controversy had little effect on overall Guard training operations and suggested that any difficulties stemming from such a controversy in the future could easily be remedied through existing regulations and the withholding of federal funds from non-cooperative states. He stated:

> Based on my discussions with key leaders of the Guard, it is my opinion that recent public comments and actions

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professionalism right here in the United States, in the schools and maneuver areas Congress has provided for that purpose.

Deployment to areas outside the CCNUS [Continental United States] is highly desirable as adventure training, to enhance morale and give the troops a broad experience, but I submit to you that in a training sense, driving a bulldozer in Fort McCoy, Wisconsin, is very similar to driving a bulldozer in Honduras.

1986 Senate Hearings, *supra*, at 100-01.

General Weber also stated:

> The narrow issue here is whether or not Congress believes that Federal training standards must include duty in Honduras, regardless of the arena of operation to which units are intended to be deployed in some future conflict. If the Congress believes that, then all Army and Air units, Regular Guard and Reserve must be sent to Honduras.

Id. at 100.

General Weber concluded:

> Any legislative action at this time would not serve to improve Guard readiness or availability in the event of emergency or war. If the Congress is concerned that the Chief of the National Guard Bureau cannot employ current directives to ensure proper training of the Guard forces, they can, and should, direct that he report periodically on any instances of refusal to train which are likely to adversely impact on readiness.

Id. at 102.

> by state authorities have not impaired the nation's ability to rely on the National Guard nor have they adversely impacted the units' readiness.
>
> I strongly agree and believe the recent actions are only an irritant which can be dealt with through existing statutes and regulations. The Chief of the National Guard Bureau has the authority to manage Federal funds appropriated for Guard training and can direct action as Chief of the agency serving as the line of authority between the Army and Air Force and the states.

1986 Senate Hearings, *supra*, at 99.[34]

One last *pragmatic* consideration. It is important to realize that National Guard forces were involved in the recent invasion of Grenada and the bombing of Libya. In both of these instances, the Guard was activated under 10 U.S.C. § 672, for "training", rather than under the operations provisions, 10 U.S.C. §§ 673, 673a, 673b, which require a declaration of

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[34] General Walker described in careful detail the "crisis" in National Guard training operations that led to the Montgomery Amendment:

> In 1986 [the year the Montgomery Amendment was enacted] more than 42,000 members of the Army and Air National guards trained overseas in 46 countries. More than 9,000 Army and Air Guard personnel from 43 states and territories trained in Central America alone.
>
> * * * *
>
> The few governors that have precipitated [the Montgomery Amendment] have stopped a total of 48 people from training in one country—Honduras—not the other 45 countries. *These 48 people constitute .0001 percent of the total deploying force—less people than report to sick call on an average base on a given day, less people than have had to forego scheduled training for employer support reasons and less people than have had to forego participation due to other commitments. Clearly 48 people in comparison to the total deploying forces or the entire Guard strength is insignificant in terms of impact.*

1986 Senate Hearings, *supra*, at 94-3-5 (emphasis added).

emergency or consultation with Congress. *See* Testimony of Secretary Webb, 1986 Senate Hearings, *supra*, at 83;[35] Com-

[35] The following exchange concerning the recent bombing of Libya by American forces comes from the 1986 Senate Hearings:

> Senator Levin: Would [the Libyan raid] be treated as a training mission?
>
> Mr. Webb: That was under 672(d) which is for training.
>
> Senator Levin: So, that use of National Guard troops in Libya was considered a training mission by the DoD?
>
> Senator Warner: Under the law.
>
> Senator Levin: Is that the way DoD considered it, training?
>
> Mr. Webb: Under the law.
>
> What you have is the compression of missions once the Total Force Doctrine came into effect so that you have National Guard units all over the world on any given day under the rubric of 672, which is a problem because you have to go all the way from 672 to a Presidential 100-K call-up with very little in between.
>
> I understand where you are going and it is a problem. We have a difficult time defining what is an operational mission with the compression of these missions under the Total Force Doctrine.
>
> Senator Levin: I wondered whether DoD considered that a training mission in Libya? That is my question.
>
> Mr. Webb: I do not have authority to speak on how Secretary Weinberger would have termed that.
>
> Senator Levin: Could you answer that also for the record? Could you check with the Secretary's office and let us know that, too?

1986 Senate Hearings, *supra*, at 82-83.

Secretary Webb later sent the subcommittee the following written response to Senator Levin's question:

> The Air National Guard aircraft utilized in support of the Libyan raid was already in Europe as part of routine tanker task force activities. Under long standing practice, Guard and Reserve air refueling aircraft supplement active force refueling aircraft assigned to a tanker task force stationed in Europe. The tanker task force provides day-to-day refueling training opportunities to Guard and Reserve crews, and is also available to the theater commander to meet any operational requirement that may arise. The Libyan raid was just such an operational requirement. The Guard aircraft was not sent to Europe for the specific purpose of participating in the Libyan raid. Under section 672(d) the crews can be on active duty, including active duty for training. The crew of this Guard aircraft was on active duty.

Id. at 83 (attachment).

ment, *supra* note 2, at 636. Some commentators have suggested that this use of these active duty provisions for "training" was "surreptitious" and designed to elude the statutory requirements for operational missions. *See* Comment, *supra* note 2, at 636. Whatever the case, prior to the Montgomery Amendment, the governors, as the representatives of their states, provided at least some check on the potential abuse of these provisions. Without the governors, there would be no check at all.

VIII. *Conclusion*

The world has changed since 1787. It is smaller than it once was. Today's military forces need to be able to respond promptly. Yet, the world has not changed so dramatically that we can no longer abide by the explicit provisions of our Constitution. Congress simply cannot take away state control over the militia by calling the militia by a different name, NGUS, and by giving it concurrent federal duties.

Federalism is not yet meaningless. It remains a vital element in our constitutional system, both as a check on the unwise use of central power and a bulwark of the freedom that derives from local autonomy. In this light, it is undeniable that fundamental powers given to the states explicitly in the Constitution—whether these powers concern civil rights, property rights or state militias—cannot in the absence of the formal amendment process be rendered a legal nullity by the sheer force of a political expediency.

The requirement that the President or the Congress declare the existence of a national exigency—particularly when that

statement is not subject to challenge—is a small concession indeed to the doctrine of separation of authority which underlies our constitutional system.

When the nation did not face a specific internal or external threat, the Framers wished part of the nation's military power to be under the control of the states to check the possibility of abuse of military power by the federal government. In this vein, the Constitution of the United States "reserv[es] to the States respectively * * * the Authority of training the Militia * * * ." When the words and the intent come together in such a manner, our duty is clear. We must uphold the Constitution.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 87-5345

RUDY PERPICH, etc., et al.,

Appellants,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Appellees.

AMENDED ORDER

Appeal from the United States District Court for the District of Minnesota

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Appellee's petition for rehearing en banc has been considered by the Court and is granted. The Court's opinion and judgment of December 6, 1988 is hereby vacated.

January 11, 1989

Order Entered at the Direction of the Court:

ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals,
Eighth Circuit.

PETITION FOR WRIT OF CERTIORARI

No. 89-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RUDY PERPICH, as Governor of the State of Minnesota, and THE STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (PART II)

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UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 87-5345

Rudy Perpich, Governor of the State of Minnesota;
State of Minnesota, by its Attorney General
Hubert H. Humphrey, III,

Appellants,

Commonwealth of Massachusetts, et al.

Amicus Curiae

v.

United States Department of Defense, United States Department of Air Force, United States Department of Army, National Guard Bureau, Frank Carlucci, Secretary of Defense; John O. Marsh, Jr., Secretary of the Army; Edward C. Aldridge, Secretary of the Air Force; Lt. Gen. Herbert R. Temple, Jr., National Guard Bureau,

Appellees.

U.S. National Guard Assn.,

Amicus Curiae

Firearms Civil Rights Legal Defense Fund,

Amicus Curiae

Appeal from the United States District Court for the District of Minnesota.

Submitted: February 9, 1988
Filed: December 6, 1988

Before HEANEY, Circuit Judge, FAIRCHILD,* Senior Circuit Judge, and MAGILL, Circuit Judge.

HEANEY, Circuit Judge.

I. *Introduction*

Prior to 1986, state National Guard units could not be sent on federal training missions without the consent of their state governors. *See* 10 U.S.C. § 672(b) and (d). The Montgomery Amendment, Pub. L. No. 99-661, § 522, 100 Stat. 3816, 3871 (codified at 10 U.S.C. § 672(f) (1986)), prohibits governors from refusing permission on the basis of the "location, purpose, type, or schedule" of the training mission. It thus effectively eliminates the prior consent requirement.

The Constitution of the United States provides that Congress shall have the power:

> To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, *reserving to the States respectively* * * * *the Authority of training the Militia* according to the discipline prescribed by Congress.

U.S. Const. art. I, § 8, cl. 16 (Clause 16) (emphasis added).

Members of the Minnesota National Guard are concurrent members of the Army National Guard of the United States or the Air National Guard of the United States, which

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* The HONORABLE THOMAS E. FAIRCHILD, United States Senior Circuit Judge for the Seventh Circuit, sitting by designation.

are reserve components of the United States Army and the United States Air Force. In 1986, the United States Department of Defense ordered members of the Minnesota National Guard to active duty for training missions in Central America pursuant to 10 U.S.C. § 672(b) and (d).

Governor Rudy Perpich of Minnesota claims that, but for the Montgomery Amendment, he would not have consented to one of these training missions. Further, he expects that the Department of Defense will order Minnesota National Guard troops to active duty for training purposes outside of the United States in the future. Perpich claims that the Montgomery Amendment, by effectively withdrawing the gubernatorial consent requirement of 10 U.S.C. § 672(b) and (d), violates the militia training clause of the United States Constitution.

In response, the government argues that the Montgomery Amendment is a proper exercise of congressional authority derived from its powers to raise and support armies together with the necessary and proper clause. Specifically, it contends that these two powers, exercised together, can supersede the states' reserved authority over the militia at will. In addition, the government asserts that the gubernatorial consent requirement allows the states to participate in national defense and foreign policy decisions in ways the Constitution does not permit. Finally, because of the importance of the National Guard to the national defense, the government argues that pragmatic considerations require this Court to read anachronistic state powers embodied in the militia clauses very narrowly.

The district court granted the government's motion for summary judgment, in essence agreeing with the government's first argument. *Perpich v. United States Dep't of Defense*,

666 F. Supp. 1319 (D. Minn. 1987); *see also Dukakis v. United States Dep't of Defense*, 686 F. Supp. 30 (D. Mass. 1988), *aff'd*, No. 88-1510 (1st Cir. Oct. 25, 1988) (per curiam) (Dukakis).

We reverse and hold that the Montgomery Amendment, which deprives the states of the "Authority of training the Militia," violates the Constitution of the United States.

First, the Montgomery Amendment contravenes the intent of the Framers. The Framers designed the militia (or National Guard) to serve as a check on the potential abuse of military power by the federal government. Specifically, they intended the states to exercise control over the milita (or National Guard) when the national security was not threatened. In these circumstances, the states were to have authority to withhold support from military projects of the federal government they did not support. Next, the Framers created the second amendment to guarantee the perpetual existence of state-controlled militia (or National Guard) as a check on the abuse of military power by the federal government. *See* U.S. Const. amend. II. Further, if the Framers intended the army power to supersede state control over the militia (or National Guard), it was only in circumstances in which the national security was threatened. Finally, the Framers believed that powers, such as the reserved state authority over the militia, were enumerated in the Constitution to be insulated from irresponsible, short-term political reaction. The Montgomery Amendment frustrates all of these purposes.

Second, the Montgomery Amendment violates the plain language of the Constitution. To further the intentions listed above, the Constitution "reserv[es] to the States respectively * * * the Authority of Training the Militia * * * ."

Third, the Montgomery Amendment is at odds with the declarations of the Supreme Court. The Court has stated

that the army power supersedes the militia power only if the government declares war or alternatively determines the existence of a national exigency.

Fourth, the Montgomery Amendment violates constitutional requirements by attempting to supersede reserved state authority over the militia (or National Guard) without an affirmative declaration of a national emergency or exigency.

Fifth, prior to 1986, congressional legislation concerning the National Guard had done nothing to change its state-controlled character when the national security is not threatened. The Montgomery Amendment thus departs from an unbroken pattern of congressional deference to reserved state authority over the militia (or National Guard), embodied in the militia clauses.

Sixth, gubernatorial veto power over federal requests for National Guard troops, when the national security is not threatened, does not impermissibly involve the states in defense or foreign policy decisions.

Finally, the government has not demonstrated that the effectiveness of either the national defense or the National Guard will be diminished by adherence to the constitutional principle of basic state control over National Guard forces, absent a declaration of war or national exigency.

II. *The Intent of the Framers*

A. The Militia Clauses

As with many other powers defined in the Constitution, the military power of the United States was based on a system of checks and balances. The Framers divided authority over the military, not only between the coordinate branches of the federal government, but also to a significant degree between the federal and state governments.

The division of power between the federal government and the states is emphasized in several ways. First, because of

the Framers' fear that a large standing army would lead to military abuses by the federal government, state militias were intended to comprise the bulk of the nation's defensive force. Second, control over these militias was explicitly shared between the federal government and the states. (In this light, the states were to appoint the militia's officers and to control the actual training of militiamen.) Third, while the Framers did not want the states to make positive national policy in the areas of defense or foreign relations matters,[1] they did intend the states to use their control over the militia to prevent the federal government, except in circumstances where they believed the national security was threatened, from using state troops in military undertakings objectionable to the states and their citizenry.

Under the Articles of Confederation, the states were required to "keep up a well regulated and disciplined militia * * * ." U.S. Arts. of Confed. art. VI. The central government had power to declare war and the supervisory authority to order the states to produce quotas of armed and trained troops. *Id.*, art. IX. This system proved unworkable. The states had too much independent power to resist the requests of the central government. The troops provided were often inadequately trained and equipped and thus difficult to coordinate into a cohesive defensive force.

Thus, as the delegates assembled during the summer of 1787 to draft a more viable instrument of government, one of the most pressing objectives was the creation of a stronger, more reliable defensive force. This broad aim was widely

[1] The Constitution provides that "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; * * * keep Troops, or Ships of War in time of peace, enter into any Agreement or Compact with another State, or with a Foreign Power, or engage in War * * * ." U.S. Const. art. I, § 10, cls. 1, 3.

shared; however, the effort to find a specific solution proved extremely divisive. From the outset, it was agreed that the problem would not be solved by the creation of a large, federally controlled standing army. The Framers identified such a force with British tyranny, potential oppression of both the states and individual citizens, and expensive, unpopular military adventures.[2] Thus, while the Framers would ultimately provide for a standing army, they limited its power by declaring that military appropriations had to be approved every two years. U.S. Const. art. I, § 8, cl. 12. More importantly, the Framers intended state militias to provide for the nation's basic defense, with reliance on a standing army only as a last resort.[3]

[2] *See* Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493, 1507-1541 (1969). Indeed, as delegate Edmund Randolph noted at the Virginia ratifying convention, "there was not a member of the federal convention who did not feel indignation" at the idea of a standing army. 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 401 (1901) (Elliot). *See also* Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 924 (1988) (Hirsch); Comment, *The Constitution and the Training of National Guard Officers: Can State Governors Prevent Uncle Sam From Sending the Guard to Central America?*, 4 J. L. & Pol. 597, 600, 601 (1988) (authored by P. Fish) (Comment).

[3] As the Supreme Court noted in *United States v. Miller*, 307 U.S. 174, 179 (1939), "The sentiment of the time [of the ratification of the Constitution] strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured through the Militia—civilians primarily, soldiers on occasion." *See also* Hirsch, *supra* note 2, at 924. Apparently, this view was a longstanding one, for Hirsch notes that militia "did the bulk of the fighting, often with success, in the War of 1812, the Mexican-American War, the Civil War (for both the Confederacy and the Union), and the Spanish-American War." *Id.* at 943. Hirsch points out that for the duration of the nineteenth century, "the militia remained the primary military force of the country." *Id.* at 944. "By 1898," he notes, "the regular army had 18,000 troops, compared to 115,000 militiamen." *Id.*

As a corollary to the decision to rely largely on the militia for the nation's defense, it was necessary to provide increased federal control over these forces in order to achieve the goal of improving the nation's military effectiveness. The Convention rapidly agreed that the state militias would be placed under the control of the federal government in emergency situations, such as when insurrection or invasion was threatened, or when the militias were needed to enforce the laws of the country. *See* U.S. Const. art. I, § 8, cl. 15 (Clause 15) ("Congress shall have the power * * * [t]o provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions * * * ").[4] However, in other cases, the degree of control the federal government would exercise over state militias was a point of extreme contention.

Nationalist delegates believed in strong federal control of the state militias in order to create a dependable, coordinated defensive force.[5] States-rights delegates profoundly opposed

[4] The United States, at the time the Constitution was ratified, was a nation of extreme isolationist sentiment. According to one noted commentator, "[P]eace was expected to be the customary state of the new nation. America would avoid aggressive war abroad and enjoy in turn 'an insulated situation' from the great powers of Europe * * * . This placid view of foreign relations precluded any explicit consideration of the use of American force abroad, except for defensive naval action * * * ." W. T. Reveley, *War Powers of the President and Congress* 61 (1981).

Thus, it might be that the Framers intended the militia to be available whenever the security of the union was threatened, and that insurrection, invasion, and the need to execute the law were the only such threats that the Framers, given their world view, specifically contemplated.

[5] Early in the Constitutional Convention, for example, Alexander Hamilton presented a proposal urging "the militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them." *See* J. Madison, *Notes of Debates in the Federal Convention* 164 (Hunt 1920). The Convention ignored Hamilton's proposal.

such federal power.[6] These delegates voiced fears that powerful federal authority over the state militias would, like the existence of a large standing army, lead to military abuses by the new government. They particularly feared that such authority would allow the federal government to tyrannize defenseless individual states and their citizens[7] and could leave the states without the means to meet their own public needs.[8]

The debate between these factions was vigorous, for neither extreme had sufficient support at the Convention for its

[6] Madison's notes from the Federal Convention indicate the strong opposition many delegates voiced to giving the federal government too much control over the militia.

Delegate Oliver J. Elsworth of Connecticut:

The whole authority of the militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power. He thought the [general] Authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people. It must be vain to ask the States to give the Militia out of their hands.

Delegate John Dickinson of Delaware:

We are come now to a most important matter, that of the sword. His opinion was that the States never would nor ought to give up all authority over the Militia. He proposed to restrain the general power to one fourth part at a time, which by rotation would discipline the whole Militia.

Madison's Notes of the Federal Convention, *reprinted in*, S. Rep. No. 695, 64th Cong., 2d Sess. 33 (1917) (*The Militia*).

[7] Delegate Elbridge Gerry of Massachusetts feared that federal control over the militia would "enslave the states" and lead to a "system of despotism." *The Militia, supra* note 6, at 31, 33.

[8] Madison's notes contain the following:

Mr. [Roger] Sherman [of Connecticut], took notice that the States might want their militia for defense [against] invasions and insurrections, and for enforcing obedience to their laws.

Id. at 34.

position to prevail.[9] After several months of discussion and many days of hard-fought exchange on the floor of the convention, delegates, such as George Mason, began to seek a compromise which would provide the federal government with sufficient control over the militia to meet its defensive needs, while at the same time assuring the states sufficient authority to check the potential abuse of military power by the federal government.[10]

On August 21, 1787, the Convention was presented with a workable compromise. The new proposal provided the federal government the authority "[t]o make laws for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the U.S." On the other hand, it preserved significant state power over the militia by "*reserving to the States* respectively the appointment of the officers, and *the authority of training the militia* according to the discipline prescribed by the U. States."[11]

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[9] *See* Friedman, *supra* note 2, at 1512-20.

[10] The power of states-rights delegates to exact significant concessions from the nationalist delegates is demonstrated in the course of the debates at the Federal Convention. Mason offered three successive proposals to the Convention, each providing the states more authority over the militia than the last. Mason's final proposal sought to provide the federal government "regulatory" authority over the militia insofar as this was necessary to establish uniformity in training and arms so that the state forces could be melded into a cohesive force when the need arose. In the states' interest, Mason proposed that this federal regulatory authority would be limited to one-tenth part of each year, that appointment of officers would be in state hands, and that the states would be exempt from federal authority whenever they needed to use their militia on state business. This, however, did not satisfy the states-rights delegates, and the matter was referred to a central committee for resolution. *The Militia*, *supra* note 6, at 31-35.

[11] *The Militia*, *supra* note 6, at 34 (emphasis added). This compromise, with minor stylistic changes, was ultimately approved by the Convention.

Delegate Hamilton declared that the authority to appoint officers was given to the states in order to secure for them "a preponderating influence over the militia." *The Federalist No. 29*, at 185 (A. Hamilton) (J. Cooke ed. 1961) (Cooke). Moreover, the debates at the Convention show that the training clause was retained in the text of the Constitution to ensure that the power to "organize, arm, and discipline" state forces given the federal government by the militia clauses did not surreptitiously extend federal control over the actual training of the militia.[12]

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[12] Clause 16 provides Congress with the power to "*discipline*" the militia and reserves to the states "the Authority of training the Militia according to the *discipline* prescribed by Congress." Amicus curiae, the National Guard Association of the United States, urges us to read the term "*discipline*" broadly enough to provide for federal control over the training process.

In examining the debates at the Constitutional Convention, we note that Delegate Sherman suggested that the clause relating to training should be deleted, because he believed it "unnecessary." He believed that the states would obviously retain this authority unless they specifically ceded it to the federal government. *The Militia*, *supra* note 6, at 35.

In response, Delegate Elsworth cautioned Sherman on this point. Madison's notes contain the following:

> Mr. Elsworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be so expounded as to include all power on the subject.

Id.

After hearing Elsworth and likely realizing that reserved powers left to the states might not be sufficient to preserve state authority over the training process, Mr. Sherman withdrew his motion to delete the training clause. *Id.*

Moreover, the debates at the Constitutional Convention indicate the power to *discipline*, at its broadest level of interpretation, means the power to prescribe *methods* of training, *rules* of conduct for the militia, *penalties* for the violation of such rules, and the *means to administer these penalties*. This power was believed

While this compromise would ultimately win the approval of a majority of the states present at the Convention, many states-rights advocates believed that the plan still granted the federal government too much authority. One of their most recurrent claims was that the proposed clause allowed the federal government to abuse its military power by sending citizens far from home for indefinite periods in futherance of military schemes objectionable to the states.[13]

Supporters of the compromise, in response, assured potential opponents of the Constitution that the national

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necessary to assure potential coordinated movement on the field of battle. It also assured the federal government of troops who uniformly understood military rules of conduct and who understood that they were uniformly subject to the same penalties for infraction of these rules. *See The Militia, supra* note 6, at 35; *see also Perpich v. United States Dep't. of Defense*, 666 F Supp. at 1325 n.9.

We thus reject the contention of the National Guard Association.

[13] In a newspaper article urging the state of Maryland not to ratify the Constitution, Luther Martin, a delegate to the Federal Convention from that state, declared the proposed system would enable the government:

> wantonly to exercise power over the militia, to call out an unreasonable number from any particular state without its permission, and to march them upon and constitute them in remote and improper services. * * * In the proposed system the general government has a power not only without the consent but contrary to the will of the state government, to call out the whole of its militia, without regard to religious scruples, or any other consideration, and to continue them in the service as long as it pleases, thereby subjecting the freemen of a whole state to martial law and reducing them to the situation of slaves.

Letter of Luther Martin in The Maryland Journal, March 18, 1788, *reprinted in, The Militia, supra* note 6, at 119; *see also* Remarks of Luther Martin before the Maryland House of Representatives, November 20, 1787, *id.* at 117-118. Similar fears were also expressed at the Pennsylvania ratifying convention. *See Pennsylvania and the Federal Convention* 598 (McMaster & Stone ed.).

government would only send the militia away from home in emergencies, such as when invasion or rebellion was threatened or when there was a need to execute the laws. *See The Federalist No. 29*, Cooke at 187. In other situations, they asserted, the states and the people would assure that the federal government did not abuse its control of the militia. Hamilton emphasized that the militia were under the "preponderating influence" of the states. *Id.* at 186. Thus, he continued, "What shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them in the same feelings, sentiments, habits, and interests?" *Id.* Hamilton concluded that, if the federal government attempted to send state troops on such adventures, its action would be based not on authority granted in the Constitution but rather on "imagined intrenchments of power." He believed that the states and the people would not tolerate such clear violations of the law.[14]

Madison, in like manner, declared that the authority of the states "as coequal sovereigns," together with the political power of the people, would form a significant check on the potential use of state militias for military adventures by the federal government. He stated:

> Can we believe that a government of a federal nature, consisting of many coequal sovereigns, and particularly

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[14] Specifically, Hamilton declared that if the central government attempted such an abuse:

> whither would the militia, irritated by being called upon to undertake a distant and distressing expedition for the purpose of riveting the chains of slavery upon a part of their countrymen direct their course, but to the seat of the tyrants who had meditated so foolish as well as so wicked a project; to crush them *in their imagined intrenchments of power*, and to make them an example of the just vengeance of an abused and incensed people?

The Federalist No. 29, Cooke at 186 (emphasis added).

having one branch chosen from among the people, would drag the militia unnecessarily to an immense distance. This, sir, would be unworthy of the most arbitrary despot. They have no temptation whatever to abuse this power; such abuse could only answer the purpose of exciting the universal indignation of the people, and drawing on themselves the general hatred and detestation of their country.

3 Elliot, *supra* note 2, at 381-82.[15]

B. The Guarantee of Republican Government Clause

The Guarantee of Republican Government Clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

During the ratification debates, many of the delegates to the state conventions feared that the federal power to suppress domestic violence in individual states provided by this clause, together with the federal power over the militia set forth in Clauses 15 and 16, posed a serious threat to the states in the form of unchecked federal military power. James Madison responded forcefully to these suggestions and, in so doing, provided clear support for the principle that reserved state

[15] Much of the discussion concerning state power to resist federally directed use of state troops concerned the federal missions within the United States. This strengthens the application of this principle to the present dispute. The Framers, it must be remembered, were strongly isolationist in their sentiments. *See supra* note 4. Thus, if they supported a state check on national military operations that would take state forces far from home for indefinite periods within the United States, they would certainly object to unchecked federal use of the militia overseas.

authority over the militia was designed as an explicit check on the potential abuse of military power by the federal government.

In the Virginia convention, Madison stated:

> The authority of training the militia, and appointing the officers, is reserved to the states. Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repel invasions: *these are the only cases wherein they can interfere with the militia* * * *.

3 Elliot, *supra* note 2, at 90 (emphasis added).

Several days later, Patrick Henry declared that Clauses 15 and 16, together with the Guarantee of Republican Government Clause, gave the federal government "unbounded control over the national strength" and "unequivocally relinquished" the states' control over their militias. *Id.* at 422-24. In like manner, William Grayson repeatedly argued that under the proposed constitution, Congress could call out the militia whenever it desired and thus there was "no check" on federal control over the militia. *Id.* at 417-18, 421.

In response, Madison reasoned that practical necessities required dividing power over the militia between the federal government and the states. Following from this, he continued:

> If [power over the militia] must be divided, let him [Henry] show a better manner of doing it than that which is in the Constitution. I cannot agree with the other honorable gentleman [Grayson], that there is no check. *There is a powerful check in that paper. The state governments are to govern the militia when not called forth for general national purposes*; and the Congress is to govern such part only as may be in the actual service of

> the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the Service of the United States. *It is, then, clear that the states govern them when they are not.*

Id. at 424 (emphasis added).

C. The Second Amendment

The second amendment to the Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

U.S. Const. amend. II.

This amendment was made to the Constitution to reassure states-rights advocates who feared that the power of a large federal standing army would diminish the "security of a free state." The second amendment guaranteed the perpetual existence of a viable militia, as a continued check on the military power of the federal government. As the Supreme Court stated in *United States v. Miller*, 307 U.S. 174 (1939), "With the obvious purpose to assure the continuation and render possible the effectiveness of [the militia] the declaration and guarantee of the Second Amendment were made. [The second amendment] must be interpreted and applied with this in view." *Id.* at 178.[16]

D. The Framers' View of the Interplay of the Army and Militia Powers

It is not clear that the Framers contemplated the army power superseding the militia power in any circumstance.

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[16] For further evidence supporting this view of the second amendment, see 1 *Annals of Congress*, 749-52, 766-67 (J. Gales, ed. 1789); 1 S. Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* App. 300 (1803); 3 J. Story, *Commentaries on the Constitution of the United States* §§ 1890-91 (1833).

However, if they did, such occurrences could only be in narrowly confined situations, such as national exigencies or situations in which the national security was threatened.

The Constitution provides Congress with the power "To Raise and support Armies * * *," U.S. Const. art. I, § 8, cl. 12, and the power "To make all Laws which shall be necessary and proper to carry into Execution [these powers] * * * ." *Id.*, cl. 18.

In terms of the militia, Clause 15 provides that Congress shall have the power:

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions * * * .

Clause 16 gives Congress the further power:

> To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, *reserving to the States respectively*, the Appointment of the Officers, and *the Authority of training the Militia* according to the discipline prescribed by Congress.

Id. (emphasis added).

In *The Federalist No. 23*, Alexander Hamilton discussed the scope of the Constitution's army power clause in the following terms:

> The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy*

them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of *such circumstances*; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.

* * * *

Whether there ought to be a Federal Government intrusted with the care of the common defence, is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to the complete execution of its trust. And unless it can be shewn, that the *circumstances which may affect the public safety* are reducible within certain determinate limits; unless the contrary of this proposition can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy; that is, in any matter essential to the *formation, direction* or *support* of the NATIONAL FORCES.

The Federalist No. 23, Cooke at 147-48 (emphasis added).

The government asserts that this passage indicates the Framers believed the power to raise armies could supersede reserved state authority over the militia at will.

In response, we believe *The Federalist No. 23* does not support the government's interpretation. First, in this essay, Hamilton was writing of the "army power." There is no

reference—of any kind—in *The Federalist No. 23* to the interaction of the army power with the militia power. There is no reference to the militia or to the militia clauses at all. Second, when Hamilton did actually discuss the militia power explicitly in *The Federalist No. 29*, it directly contradicts the interpretation the government gives *The Federalist No. 23*.

Strange as it may now seem, the Framers feared that if the militia did not exist to protect state interests, the army might be used by the federal government to oppress the states and their citizens.[17] Thus, Hamilton, in *The Federalist No. 29* (along with Madison in *The Federalist No. 46*), declared that an essential purpose behind the states' reserved authority over the militia was to guard against the dangers of the federal army.[18]

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[17] *See supra* note 7.

[18] Specifically, Hamilton declared that a strong militia obviated the need for a potentially oppressive federal army:

> [I]f circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and in the use of arms, who stand ready to defend their own rights and those of their fellow citizens. This appears to me the only substitute that can be devised for a standing army; the best possible security against it, if it should exist.

The Federalist No. 29, Cooke at 184-85.

Next, responding to the argument that the Constitution's militia clauses provided the federal government the power to oppress the states with their own militias, Hamilton continued:

> There is something so far fetched and so extravagant in the idea of danger from the militia, that one is at a loss to treat it with gravity or with raillery * * *. What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia, and to command its services when necessary; while the particular States are to have the *sole and exclusive appointment of the officers?* If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the Federal Government, the

Thus, Hamilton *could not have meant* that the army clause has the power to supersede the reserved state authority over the militia at will. If the federal government could use the army power at will to make the militia a federal force under its plenary control, then the militia clauses could not serve their intended purpose to protect the states against potential oppression by the federal army.[19]

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circumstances of the officers being in the appointment of the States ought at once to extinguish it. *There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.*

Id. at 185 (emphasis added).

In a similar vein, Madison wrote:

Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger * * * . To these [a standing army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

The Federalist No. 46, Cooke at 321.

[19] The dissent points to the fact that Hamilton in *The Federalist No. 29* argued that the militia should be regulated and disciplined by Congress. This, however, does not diminish Hamilton's assertion of the states' "preponderating influence over the militia," nor does it in any way contradict the principle of state control of the militia as an essential check on federal military power.

The dissent next asserts that the existence of other structural provisions in the Constitution designed to protect against the dangers of a standing army—*see, e.g.*, Art. I, § 10 (two year limitation on appropriations for the army); Art. IV, § 4 (guarantee of republican government for the states)—somehow demonstrates that the militia was not designed as a check. We believe that these

Given the basic nature of this contradiction (and the fact that *The Federalist No. 23* does not even discuss the militia), it is likely that Hamilton was simply writing about the broad authority of the army power to serve the national defense, without reference to the militia power. Alternatively, *The Federalist Nos. 23 and 29* can be read together to allow the army power to supersede the militia power in more tightly confined circumstances.

Hamilton, in *The Federalist No. 23*, speaks of the broad and unhindered sweep of the army power very clearly in the context of unforeseeable "*national exigencies*," or, phrased in other ways, in terms of the "*circumstances that endanger the safety of nations*," or "*circumstances which may affect the public safety*." Clearly, these phrases are significant to Hamilton, and by reading such a "national exigency" as a necessary requirement before the army clause can supersede state authority over the militia, the seemingly contradictory messages of *The Federalist No. 23* and *The Federalist Nos. 29 and 46* can be harmonized.

If the authority of the army clause to supersede the reservation of state authority in the militia clauses is limited to "national exigencies" or "circumstances that endanger the safety of the nation," federal power over the militia can only "trump" the state power when the whole union, or the national interest, is in some way threatened. If such a threat did

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other provisions support the notion that the Framers were deeply afraid of a standing army and were prepared to take concrete constitutional steps to guard against its power. Thus, the existence of these other provisions actually bolsters the argument that state control of the militia was designed as a check on the federal military power.

not exist, the states would then be protected from the oppressive exercise of federal authority by the militia clauses.[20]

E. The Framers and Faction

Certain powers, such as reserved state authority over the militia, were enumerated in the Constitution in order to be insulated from uncontrolled and potentially irresponsible short-term political reaction. Such powers represented fundamental structural decisions by the Framers, based on their view of political society. They realized that, unless insulated, these powers could be eliminated in the heat of the moment by ill-considered political reactions to popular outcry. *See The Federalist No. 10* (J. Madison).

III. *The Text of the Constitution*

The plain language of Article I, Section 8, Clause 16 of the Constitution "*reserv*[*es*] *to the States respectively* * * * *the Authority of Training the Militia* * * * ." This is an unambiguous command in the text of the Constitution. The government has a nearly insurmountable burden in justifying actions in derogation of it.

IV. *The Supreme Court*

In the *Selective Draft Law Cases*, 245 U.S. 366 (1918) and *Cox v. Wood*, 247 U.S. 3 (1918), the Supreme Court held that

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[20] The government also cites George Washington's statement "that Congress has the power by the proper organization, disciplining, equipment and development of the militia to make it a national force, capable of meeting every military *exigency* of the United States." H. Rep. No. 297, 34th Cong. 1st Sess. 2 (1916) (emphasis added). In response, it is likely that Washington was speaking of those exigencies outlined in Clause 15—insurrection, invasion, and executing the laws. However, even assuming that the Framers wished the militia to be a national defense force capable of "meeting every military *exigency* of the United States," this does not mean that the army power and the necessary and proper clause can transform an entity largely controlled by the states into a part of the federal government at any time and for any reason.

the power to declare war and the power to raise and support armies invoked together can supersede reserved state authority embodied in the militia clauses. Hence, because the Montgomery Amendment was not passed under the authority of the war power, these cases are distinguishable from the present dispute.

In *dicta*, the *Selective Draft Law Cases* stated that, in the absence of a declaration of war, the army clause and the necessary and proper clause can supersede the states' reserved authority over the militia *only* if the government determines the existence of a national exigency.

A. The Court's Holding

The *Selective Draft Law Cases* are clearly distinguishable from the present dispute. The Selective Draft Law of May 18, 1917, ch. 15, 40 Stat. 76, was passed in the midst of national emergency, shortly after Congress had declared war on Germany. The act unambiguously recites that the country was faced with an "emergency, which demands the raising of troops in addition to those now available." 40 Stat. at 76. Further, the Court declared that the statute at issue was enacted under the war power.

It stated:

> [T]he possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "*to declare war*; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces." Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for

carrying into execution the foregoing powers." Article I, § 8.

245 U.S. at 377 (emphasis added).

The Supreme Court, in a unanimous opinion by Chief Justice White, held that the conscription statute passed under the powers to declare war and to raise and support armies, together with all the other military powers available to the federal government, gave the federal government authority to conscript male citizens. Further, it held that this authority was not limited by the states' reserved authority over the militia. The Court's holding was succinctly summarized four months later in another opinion, on a closely related issue, by Chief Justice White, writing again for a unanimous Court.

The Chief Justice wrote:

> [O]n the face of the opinion delivered [in the *Selective Draft Law Cases*] the constitutional power of Congress to compel military service * * * was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution *to declare war* and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of *the war power* to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority *to declare war* and raise armies, and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate,

> and for the purpose of *the war power*, wholly incidental if not irrelevant and subordinate, provision concerning the militia, found in the Constitution.

Cox v. Wood, 247 U.S. at 6 (emphasis added).

Thus, the Court's holding in the *Selective Draft Law Cases* does not support the government's argument. The Court declared that in the middle of a war—one of the most extreme situations a nation or government can face—that the federal government can use *all* its military powers combined to supersede the states' reserved authority over the militia.[21] This is

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[21] In order to preserve the applicability of the *Selective Draft Law Cases* to the dispute before us, the dissent states that *Lichter v. United States*, 334 U.S. 742, 757 (1948) "described Congress' 'war power' in a manner which apparently comprehends all the grants of authority in the specific clauses of article 1, section 8 that concern provision for the common defense." Following from this, it asserts that the powers to raise and support armies, and to regulate and call for the militia (along with the authority of granting letters of marque and reprisal, building fleets, laying and collecting taxes, etc.) are "part of the war power." "Thus," the dissent concludes, "the legitimacy of Congress' exercise of authority in military affairs does not necessarily rest on the * * * express declaration of national security emergency advanced by the majority." *Id.* See *post*, section I.

Lichter, however, does not support the dissent's position. In that case, the Supreme Court declared that a statute designed to recover excess war profits (the Renegotiation Act) was a valid exercise of the power to raise and support armies and the necessary and proper clause *during a declared war*. 334 U.S. at 757-58. The Court never stated that the army or the militia clauses (or any of the other Art. I, § 8 clauses) are "a part of," or in any sense equivalent to, the specific power of Congress "to declare war." Thus, the *Selective Draft Law Cases* remain clearly distinguishable.

In the end, the Court mentions the term "war power" only once in *Lichter* and in a way that provides no support to the dissent's position. After discussing the power to raise and support armies and the necessary and proper clause, the Court outlines the central issue of the case:

completely different from the position that the government can assume plenary control over state forces at will. The Court's position clearly allows the militia clauses substantial integrity when the national government does not face a crisis. The government's position essentially eliminates reserved state authority.[22]

In view of [these powers], the only question remaining is whether the Renegotiation Act was a law "necessary and proper for carrying into Execution" the *war powers* of Congress and especially its power to support armies.

Id. (emphasis added).

Here, the Court, in an extremely casual sense, simply discussed the power to raise and support armies as one of the "war powers" of the federal government *during a declared war.* (In a similar vein, the Court had earlier suggested that some of the powers provided the Congress in Art. I, § 8 "implement[] the Congress and the President with power to meet the varied demands of war." *Id.* at 755 n.3.) The *Lichter* Court never suggested that the army clause or the militia clause (or any of the Art. I, § 8 clauses) represented "war powers"—whatever that term may ultimately mean—absent the existence of a state of war.

In essence, independent of supporting precedent, the dissent asserts that the "common defense clauses," and, in particular, the powers to raise and support armies and to call forth the militia, are "war powers" that the Congress must have without limitation—in all circumstances—in order to provide for the common defense.

In response, we believe that when war is declared, or at any time the national security is threatened, Congress has plenary authority in these areas. Moreover, in terms of providing for the common defense in the absence of war, we fully recognize that the power to raise and support armies is "broad and sweeping." *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). However, in the absence of war, national exigency or the consent of the states, the dissent has not provided sufficient authority to persuade us that the power to raise and support armies is sufficiently broad to overcome at will the states' explicitly reserved constitutional authority over training the militia.

[22] The *Selective Draft Law Cases* may also be distinguishable on a second ground. The conscription statute at issue there drafted the members of the National Guard (militia) into the army as *citizens*, not as *militiamen*. For this reason, the government argued that the power to draft *citizens* in no way infringed upon the reserved rights of the states over the *militia*, and thus the Court did not have to reach the militia clause arguments. *See Selective Draft Law Cases*, 62 L.Ed. 349, 352 (1918) (summary of oral argument). *See also* Friedman, *supra* note 2, at 1496 and Comment, *supra* note 2, at 624 & n.157. *But see Thoughts on the Conscription Law of the United States*, in *The Military Draft: Selected Readings on the Constitution* 207-18 (M. Andresen ed. 1982) (draft opinion found in the papers of Chief Justice Taney finding that federal conscription law directed toward citizens, as opposed to militiamen, implicated (and in fact violated) the militia clauses of the Constitution); Freeman, *The Constitutionality of Peacetime Conscription*, 31 Va. L. Rev. 40 (1944).

B. The Court's Dicta

There is *dicta* in the *Selective Draft Law Cases* stating that the army clause can supersede the reserved state authority over the militia, but only if the Congress determines there is a "national exigency." In this *dicta*, the Court also reaffirms that the militia clauses reserve to the states authority over training the militia. Finally, although the Court believes that there are exceptional circumstances in which the army clause can override the militia clauses, this authority should not be read to confuse the two "distinct and separate" powers or to "weaken or destroy" the integrity of the militia clauses.

The *dicta* concerning the interplay of the army and militia powers begins with the Court noting that an improved understanding of the scope of these provisions can be gained by comparing the powers of the federal government before and after the Constitution was ratified. Under the Articles of Confederation, Congress had the right "to call on the states for forces." 245 U.S. at 382. Correspondingly, the states had an inescapable duty to furnish troops when called. This, "embraced the complete power of government over the subject." *Id.* The Court analogized this power to the authority to raise armies under the Constitution.

However, following immediately on the heels of this description of "the army sphere," the Court explicitly cautioned that this power was not "at once obligatory" (i.e., "immediately usable" or "controlling") over the states. Rather, its use was confined to those *"exigencies"* in which Congress, in its discretion, saw fit to use the power.[23]

The Court stated:

> *But the duty of exerting the power thus conferred in all its plentitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play.*

Id. at 382-83 (emphasis added).

The Court then continued its comparison of the Articles of Confederation to the Constitution. Under the Articles, the Court declared, there was an open area of authority that, in the absence of the proper exercise of the power to raise armies, left the states with control over the militia. This control was, in the Court's view, analogous to the authority reserved to the states under the militia provisions of the Constitution.

The Court next explained that the militia clauses also provided further positive powers to Congress. The Court noted that Clause 15 allowed Congress to make use of the militia when insurrection or invasion was threatened and to execute the laws. Clause 16 also provided Congress with some power

[23] Chief Justice White, four months later, in *Cox*, clarified beyond doubt that his holding in the *Selective Draft Law Cases* was based on the authority of the war and army powers exercised together. Thus, by the use of the term "exigencies" here, the Chief Justice may have meant circumstances in which the war power was invoked. If this is the case, then this language is not dicta. However, if by "exigencies," the Court meant a national crisis or threat short of war, then this discussion was not essential to the specific holding of the case.

over the organization and training of state militias. However, in this regard, the Court carefully declared that *the militia clause left the specific "carrying out of" (i.e., the specific authority over) the organization and training of the militia to the states. Id.* at 383 (emphasis added).

The Court found that these "fine-tuned" powers given to Congress in the militia clauses were created to "diminish" or limit the use of the awesome army power—and its attendant dominance over state authority—to those situations in which the exercise of such vast power was *strictly necessary*.

The Court stated:

> [The Militia Clause] diminished the occasion for the exertion by Congress of its military power [under the Army Clause] *beyond the strict necessities for its exercise* * * *.

Id. at 383 (emphasis added).

In concluding, the Court emphasized the care required in interpreting the conflicting authority of the army and militia provisions of the Constitution. It was true, said the Court, that the militia clauses provided Congress other ways, in addition to the army clause, to exert power over the militia. These other grants of positive authority, however, did not diminish the strength of the army power which, *once properly exerted*—or in the Court's words, exerted *"only as in the discretion of Congress it was deemed the public interest required"*—was "complete and dominant." *Id.* at 383-84 (emphasis added).

Following from this, the Court found that the army power, when properly exercised, could "potentially" narrow the power of the militia clauses. This, however, did not mean that, without an exigency, the integrity of the militia clauses could be compromised. The Court carefully emphasized that the army and militia powers were "distinct and separate," that

both comprised meaningful areas of authority, and that neither area was to be "weakened or destroyed" by construing the other power too broadly.

The Court stated:

> Because, moreover, the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas, which were distinct and separate, to the end of confusing both the powers and thus weakening or destroying both.

Id. at 384.

Clearly, the Court found that the army power could supersede reserved state authority over the militia only when Congress had determined there was some sort of exigency or extraordinary need to exert federal power. In other cases, the Court found that the integrity of the militia clauses was preserved and could not be diminished by the army power.

V. *The National Exigency Requirement*

The *Selective Draft Law Cases* declared that the federal government must determine the existence of a national exigency before the army clause and the necessary and proper clause can supersede the reserved state authority over the militia. We believe the Court's *dicta* was correct.

Like the Supreme Court, we are now faced with the interplay of two constitutional provisions which have the potential to conflict in their exercise. Both have power and purpose, and thus in harmonizing these provisions, we must attempt to preserve as much of the authority of each as we sensibly can.

It is true that the Framers believed that the army power "ought to exist without limitation"—but only in the context of "national exigencies" that might endanger the country. *See*

The Federalist No. 23, supra. Further, Clause 15 provides for federal control of the militia only when the nation was faced with serious threats to the national security, such as invasion, rebellion, or the need to execute the laws. While we recognize that these contingencies no longer represent explicit limits on federal use of the militia (or National Guard), they do underscore the basic gravity of circumstance the Framers believed necessary before state militias could be made into a federal force.

Correspondingly, the Framers distrusted large, centralized establishments of military power, either in terms of a large federal army or a militia fully under federal control. For this reason, they divided authority over the nation's military and intended the states to retain significant control of the militias as a check on potential abuse of military power by the federal government.

In the end, if the federal government could make the militia a federal force at will, the militia's intended purpose as a check on federal military power would be frustrated.[24] More-

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[24] The United States District Court for the District of Massachusetts similarly found that the government's position concerning the power of the army clause leads to the "abolition" of the militia by leaving the militia clauses of the Constitution without practical application. Specifically, the court stated:

> Counsel for the defendants conceded at oral argument that [its] conception of the dual-enlistment system makes the militia dependent on Congress for its existence because, in a practical sense at least, the militia exists only when Congress does not want or need it as a part of the Army. Under such a dual-enlistment concept, pushed to the logical limit, Congress could at any time order the entire militia into active duty year-round, thus abolishing the militia and leaving the Militia Clause without practical application. A plain reading of the Constitution supports plaintiffs' contention that Congress cannot "abolish" the militia by transforming it into a part of the Army. *See* U.S. Const. amend. II ("A well regulated militia being necessary to

over, the Framers' intent—particularly in light of the structure of the militia clauses—cannot be fairly read to support

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the security of a free State . . .); Militia Clause, *supra*, ("reserving to the States respectively . . . the Authority of Training the Militia according to the discipline prescribed by Congress).

Dukakis, *supra*, 686 F. Supp. at 36.

In order to avoid these problems, the court departed from the government's position and distinguished the *Selective Draft Law Cases* from the present controversy concerning the Montgomery Amendment by noting that the Selective Draft Law controversy arose in wartime. Thus, according to the court, it followed that the "present controversy presents the issue of accommodation between the Armies Clause and the Militia Clause in a context less compelling than that of *Selective Draft Law Cases*, for priority of the Armies Clause." *Id.*

While all this appears clear—and consistent with our opinion—the court, at this point in its analysis, rapidly moved to a resolution of the issue we cannot understand. It simply concluded: "Nevertheless, guided by the decisions in the dual-enlistment cases as well as that of *Selective Draft Law Cases*," the states' reserved authority in the militia clauses "does not *override* the legitimately exercised power of Congress '[t]o raise and support Armies.'" *Id.* (emphasis added).

In essence, the court acknowledged that if the militia clauses are to have any continuing meaning, there must be a line of reserved state authority over which the federal government cannot cross. However, the court neither explained where that line is nor why it believed the Montgomery Amendment falls on the permissible side of that line. In reaching its conclusion, the court simply made three arguments which apparently led it to reject a broader reading of state authority over the militia.

We find none of these arguments persuasive.

First, the court asserted that "[i]f the Militia Clause is interpreted as limiting Congress' power to order the militia to active duty as part of the Army, then the Armies Clause would be without practical application because the states could enlist all citizens in the militia and thereby 'abolish' the army." *Id.*

This assertion is incorrect. The Constitution provides that Congress can make the militia part of the army in times of insurrection, rebellion, and when there is a need to execute the laws. Moreover, even prior to the Montgomery Amendment, it had long been understood that in a national emergency or exigency, the

plenary federal control of the militia, absent a threat to the national security.

Based on these considerations, we conclude, as did the Court in the *Selective Draft Law Cases*, that before the federal government can exercise its army power to supersede the reserved state authority over the militia, its actions must be motivated by a state of events which amounts to a "national exigency" or, in other words, a situation in which the national security faces a specific threat.

Implied in this requirement, to assure its observance, is the necessity of an affirmative declaration. Thus, before the legislative or executive branch can use the authority of the army

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militia could be put under federal control. Thus, a broad reading of constitutionally reserved state authority over the militia could not logically lead to "abolition" of the army.

Second, the court argued that it is absurd to read the militia clauses as precluding federal training missions without state consent while at the same time permitting operational missions without such consent. *Id.* at 37-38. In response, prior to the Montgomery Amendment, each of the potential circumstances in which National Guard units could be ordered to federal service for operational missions without consent were not inconsistent with basic state control over the National Guard absent a national exigency or threats to the national security.

In its third argument, the court concluded that "disputes are to be resolved through the political processes (rather than in courts) where in essence they are disputes as to whether particular calls of units of the militia to temporary active duty, and the locations to which units are sent during such a period, do or do not serve national interests." *Id.* at 38.

While we thoroughly agree with this sentiment, we do not agree that this dispute turns on the question of whether it is in "the national interest" to send the Minnesota National Guard, or any individual Guard unit, to Honduras or to any other specific location. It turns on the question of whether, and to what extent, the federal government can take away authority arguably reserved to the states by the Constitution. We believe that it is proper for us to resolve such an issue.

clause to overcome reserved state authority over the National Guard, Congress or the President must first affirmatively assert the existence of a national exigency or of a specific threat to the national security.

The power to determine the existence of such circumstances belongs only to Congress or the President. Once this power is exercised, the substance of the determination cannot be challenged by the states or by individual National Guard members sent into federal service. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827). Such a challenge would involve a central "political question," *see Baker v. Carr*, 369 U.S. 186, 213, 217 (1962), and would hence not be justiciable.[25]

Given the fact that such a requirement could not be enforced in a court challenge, it might be questioned what force it has as a check on the federal government. In response, we believe that the declaration of a national exigency or that the national security is somehow threatened is a very serious undertaking. It alerts the coordinate branches of government, the states, the citizens of the nation, and the nations of the world that the United States believes its interests are threatened and that

[25] In defining the term "political question," the *Baker* Court stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

We believe the determination of a national exigency satisfies *all* of these requirements and, hence, is clearly a political question.

it is prepared to take appropriate steps. Such a determination, we believe, will not be made lightly.

VI. *From the Militia to the National Guard*

Over the last eighty-five years, Congress has reorganized the militia into the National Guard. Through these legislative changes, Congress has used its constitutional power to "organize, arm, and discipline" to better order and coordinate state National Guard units. Congressional action has also recognized the plenary authority of the federal government over the National Guard in a national emergency or exigency. Throughout this process, Congress has taken great care to observe state authority over the militia (or National Guard) and, until the enactment of the Montgomery Amendment, had not altered the underlying state-controlled character of the National Guard.

A. The Dick Act of 1903

After the poor performance of state militia in the Spanish-American War, Congress began to use its Clause 16 power to "organize, arm and discipline" the militia, together with federal funds to improve the organization and coordinate the training of state militias. Thus, after 111 years, during which the national militia laws had been relatively unchanged,[26] Congress in 1903 passed the "Dick Act." *See* Act of January 21, 1903, ch. 196, 32 Stat. 775. This law renamed the organized militias of the states the "National Guard." Second, beginning a trend of enormous long-term significance, the federal government began to equip state National Guards with federal funds and to train them with regular army officers. This aid was conditional, however, on compliance with federal stand-

[26] The Uniform Militia Act of 1792, ch. 33, 1 Stat. 271, remained the primary law regulating the militia until 1903.

ards for training and organization. In the years that followed, federal funding of state National Guards expanded dramatically, and federal authorities increasingly used the threat of funding "cut-off" to induce states to comply with federal training and organizational requirements.

It is important to note that the Dick Act carefully observed basic state authority over the National Guard. In this light, the War Department could not issue additional arms or assign regular army officers to state Guard units until the state governor explicitly requested such assistance. 32 Stat. at 777. Similarly, Guard units could not engage in joint encampments, maneuvers or field instruction with regular troops during summer training unless the governor made a formal request for such training. 32 Stat. at 777-78.

B. The National Defense Act of 1916

The National Defense Act of 1916, ch. 134, 39 Stat. 166 (the 1916 Act), continued the use of federal funds as an inducement to further federal "organizational" control over state National Guards. The 1916 Act also recognized the constitutional limits on federal control over state National Guard forces by providing that "nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace * * * ." 39 Stat. at 198 (codified at 32 U.S.C. § 109(b)). In this light, it also declared that sentences of dismissal or dishonorable discharge from the National Guard must be approved by the governors of the respective states. 39 Stat. at 209.

C. The National Defense Act Amendments of 1933

The National Defense Act Amendments of 1933, ch. 87, 48 Stat. 153 (the 1933 Act), created the "dual status" of the National Guard. The government claims this action by Con-

gress significantly altered the nature of the National Guard and its relationship with the federal government by making the Guard more readily available for federal service. Upon examination, we believe that the legislative change in the Guard's status was a limited one designed in response to a specific mobilization problem encountered in World War I. Further, it is clear that the 1933 Act did not extend federal authority beyond situations in which the nation was faced with a national emergency or exigency.

At the outset of World War I, it was believed that the militia clauses might prevent National Guard units from being called into federal service outside of the categories listed in Clause 15. Thus, volunteer units with high morale, which had trained together and were in a relatively high state of readiness, were disbanded when the war began. The government then drafted the individual members of these units into the Army, where they were reassigned to new units. This process not only hurt Guard morale but was viewed as bad federal defense policy, given that trained units are generally in short supply at the beginning of crisis periods.

The 1933 Act was primarily designed to remedy this problem by allowing the federal government to mobilize National Guard units intact "so as to eliminate the delay incident to draft." S. Rep. No. 135, 73rd Cong., 1st Sess. 2 (1933); *see also* H. R. Rep. No. 141, 73rd Cong., 1st Sess. 2 (1933). To accomplish this objective, Congress created the "dual enlistment" concept. Dual enlistment required the members of state National Guards to be concurrent members in a new entity called the National Guard of the United States (NGUS). The NGUS was a reserve component of the United States Army created under the authority of the army clause.

Based upon this dual status, the 1933 Act gave the President power to "order"[27] the National Guard in its army status as the NGUS into federal service in the event of a "national emergency" declared by Congress. This federal power to control the National Guard, outside of the three contingencies listed in Clause 15, was a limited one, based specifically on the authority of the army clause as delineated in the *Selective Draft Law Cases*.[28]

The 1933 Act and its legislative history are clear that the grant of authority provided the President does not extend beyond a national emergency or exigency. In this light, the accompanying Senate report states that the "control, officering, and discipline [of the National Guard] except when ordered out pursuant to an emergency declared by Congress, [is left] with the respective States, just as at present. The relation of the Guard to the respective states during peace

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[27] There is a difference between a "call" and an "order." Guard units and members in the active service of the United States under an *order* merge with units and members of other components in active duty. There are no territorial limitations. Guard units and members in the active service of the United States under a *call* retain their state organizational structure. They cannot be used outside the boundaries of the United States, except on United States Territories. *See* Comment, *supra* note 2, at 608 n.75; Montgomery, *The Relation of the Militia Clause to Compulsory Military Training*, 31 Va. L. Rev. 628, 651-53 (1945).

[28] The House report indicates that this authority was based on the *Selective Draft Law Cases*. *See* H. R. Rep. No. 141, 73d Cong., 1st Sess. 4 (1933).

> The constitutional and legislative validity of the amendment to the National Defense Act to be proposed, fortified by the legislative power vested in Congress, is established by the decisions of the Supreme Court of the United States. (*Tarble's case*, 13 Wall. 397, 408; *Arver v. U.S.* (selective draft cases), 245 U.S. 366.)

Id.

is in nowise affected or altered." S. Rep. No. 133 at 2. According to the House report, the 1933 Act "reserv[ed] to the States their right to control the National Guard or the Organized militia *absolutely* under the militia clause of the Constitution in time of peace." *See* H.R. Rep. No. 141 at 5 (emphasis added).

Thus, the 1933 Act did not change the degree of federal control over the National Guard but merely codified the existence of preeminent federal power in a national emergency or exigency. Acknowledging the limited change in federal control over the Guard affected by the 1933 Act, one federal district court has declared that the "National Guard, while something of a hybrid under both state and federal control, is basically a state organization." *See Mela v. Callaway*, 378 F. Supp. 25, 28 (S.D.N.Y. 1974); *see also Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965) ("The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution.").

D. *Johnson v. Powell:* The Vietnam War and Dual Enlistment.

In discussing the dual enlistment system, *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969), declared that it "blends" the militia and army and creates a mixed military authority designed to "avoid" the limitations of the militia clauses. While we do not quarrel with the Court's result in *Johnson*, this statement concerning the motive of the dual enlistment system is clearly incorrect.

In *Johnson*, National Guardsmen challenged the constitutionality of Pub. L. No. 89-687, 80 Stat. 981 (1966). This statute, enacted in the midst of the Vietnam War, provided the President with temporary authority, based upon a deter-

mination of presidential necessity, to order a member of the NGUS to active duty for up to 24 months.

The Guardsmen alleged, *inter alia*, that the statute violated Clause 15. Specifically, they asserted that, because the duty did not fall within the powers granted Congress in that clause (i.e., the duty did not involve insurrection, invasion, or the need to execute the laws), the statute was unconstitutional. The Court responded to this claim by stating that Pub. L. No. 89-687 was not enacted under the authority of Clause 15, but rather under the dual enlistment system which was based on the army power and the necessary and proper clause.

The Court believed that the 1933 Act somehow "blended" the army and militia powers and created a mixed military authority that could be used to avoid or circumvent the states' reserved power over the militia.

It stated:

> There would be no problem [with the Guardsmen's claim] if Congress had exercised its powers under these two provisions in such a way as to maintain the separate identities of the militia and the army but the opposite is the case: Congress has provided for a blending of the militia and the army.
>
> • • • •
>
> In 1933 Congress adopted the dual enlistment concept whereby an incoming guardsman joined both the National Guard of his home state and the National Guard of the United States, a reserve component of the U.S. army. The express purpose of the dual enlistment concept was to avoid the limitations of the militia clause and to organize the National Guard under the broader power to raise and support armies.

414 F.2d at 1063 (footnote omitted).

In response, while we do not quarrel with the Court's *result* in upholding Pub. L. No. 89-687, we believe that the analysis it used was wrong.[29]

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[29] Although we do not here dispute the result in *Johnson v. Powell*, we would supplement the Court's analysis. Congress, two years prior to the enactment of Pub. L. No. 89-687, provided a strong statement indicating the presence of a "national exigency" in the "Gulf of Tonkin Resolution." *See* Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964). In this resolution, Congress specifically found that the "deliberate and repeated" attacks on United States Naval vessels in Southeast Asian waters "created a serious threat to international peace." It further declared that the "United States regards as *vital to its national interest* • • • the maintenance of international peace and security in southeast Asia." Therefore, the Congress declared its readiness, "[c]onsonant with the Constitution of the United States • • • , as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." *Id.* This statement of exigency, together with the exercise of the congressional powers to raise armies and to make laws under the necessary and proper clause, provides a far stronger constitutional basis for Pub. L. No. 89-687 than the *Johnson* Court's "blending" argument. (We would similarly supplement the analysis of the court in the case of *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968).)

In fairness, the *Johnson* court did indirectly acknowledge that Pub. L. No. 89-687 was motivated by a threat to the national security. First, in defending the dual enlistment system, the Court suggested that its "purpose" was to make National Guard troops available to the federal government when the "national security" was threatened.

Specifically, it stated that:

> [T]he statutes which make the National Guard a reserve component and state the purpose for so doing seem to bring the dual enlistment system clearly within the "necessary and proper" clause.

414 F.2d at 1063-64 (citation omitted).

The statutes the Court cited in terms of the "purpose" of the dual enlistment system were, "10 U.S.C.A. §§ 262, 263; 32 U.S.C.A. § 102." These provisions all define the basic policy underlying an order into federal service in the following identical terms:

The 1933 Act did not intend to "blend" the army and militia. The dual enlistment system in the 1933 Act was created to provide a statutory basis for the federal government to use its army power to put the National Guard under federal control in the narrow circumstances of a national emergency—nothing more. Except in national emergencies declared by Congress, control over the Guard by the states was left intact. *See* S. Rep. No. 135 at 2; H. R. Rep. No. 141 at 5. Moreover, Congress based its authority to create the dual enlistment system on the Supreme Court's decision in the *Selective Draft Law Cases*. There the Court declared that the army and militia spheres were "distinct and separate," that both comprised meaningful areas of authority, and that neither area was to be "weakened or destroyed" by construing the other power too broadly. 245 U.S. at 384.

Second, the dual enlistment system was not created to "avoid" the limitations represented by reserved state authority over the National Guard. As explained, the 1933 Act was based on the recognition that federal authority over the National Guard in a national emergency is preeminent. In such narrow circumstance, state authority is superseded, and thus there are no state limitations to avoid. The dual enlistment

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Whenever Congress determines that more units and organizations are needed *for the national security* than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States * * * shall be ordered to active duty and retained as long as so needed.

In the end, *Johnson* found that Pub. L. No. 89-687 was a valid exercise of the army clause and the necessary and proper clause through the dual enlistment system. By noting that the "purpose" of the dual enlistment system was to make state troops available to the federal government when the "national security" was threatened, the Court did indirectly acknowledge that Pub. L. No. 89-687 was motivated by a threat to the national security.

system was not a clever ploy by Congress to avoid at will the state powers embodied in the militia clauses. Rather, it was simply the statutory recognition of the constitutional principle that federal authority is supreme over the National Guard in national emergencies or exigencies.

E. The Armed Forces Reserve Act of 1952

The Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 (the 1952 Act), provided for federal use of National Guard forces in situations neither contemplated by Clause 15 nor involving national emergencies. However, in these circumstances, the 1952 Act required that the federal authority requesting Guard participation first obtain the consent of the relevant state governor.

At issue in the present case are two provisions of the 1952 Act, now codified at 10 U.S.C. § 672(b) and (d). These subsections provide the federal government with authority to call state Guardsmen to active duty with the consent of their state governors. Federal training of state National Guard troops is done under the authority of these provisions. The provisions state:

> (b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. *However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State* * * * .

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. *However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State* * * *.

10 U.S.C. § 672 (emphasis added).

With the gubernatorial consent requirement in these statutes eliminated, the government would have plenary power to put the Guard under federal control at any time and for any purpose. Such a state of affairs would clearly frustrate the reserve state authority over the militia contemplated by the Constitution, particularly by the militia training clause.

In this light, the United States Military Court of Appeals has found that the guberratorial consent requirement of 10 U.S.C. § 672(d) "has constitutional underpinnings in Art. I, § 8 of the Constitution of the United States." *United States v. Peel*, 4 M.J. 28, 29 (C.M.A. 1977) (footnote omitted); *accord United States v. Self*, 13 M.J. 132, 135 (C.M.A. 1982); *United States v. Hudson*, 5 M.J. 413, 418 (C.M.A. 1978). Moreover, although we owe no special deference to congressional judgments regarding constitutional questions, the available evidence very strongly indicates that Congress included the gubernatorial consent requirements in these provisions specifically to avoid potential conflict with reserved state authority.[30]

[30] Draft versions of the legislation that would become the 1952 Act provided that National Guard units could be ordered to active duty outside of the situations enumerated in Clause 15 or the declaration of a national emergency without first obtaining the consent of the relevant state governors. In response, witnesses who believed that such federal power violated the militia clause filed "voluminous comments" with the Senate Armed Services Committee. *See Reserve Components: Hearings on H.R. 4860 Before the Committee on Armed Services*, 82d Cong., 1st Sess. 473 (1951).

Specifically, General Ellard A. Walsh of the National Guard Association declared that a proposed bill without the gubernatorial consent requirement:

> concentrat[ed] too much power in the Executive and too much authority in the Department of Defense, and would in a number of instances infringe not only on the authority of the sovereign states but of the Congress as well.

Id. at 483.

Walsh maintained the bill without the gubernatorial consent provisions:

> very definitely violates the provisions contained in the militia clauses of the Federal Constitution, and notably article I, section 8, clause 16 thereof, which reserves to the states the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress.

Id. at 476, 482.

Such an arrangement, Walsh argued, would disrupt the basic constitutional principle that the Guard must be "responsive to the orders of the governor." *Id.* at 478.

Congress was also flooded with letters from state National Guard officials who pointed to the militia clause requirement for divided federal-state authority. Ernest Vandiver, Adjutant General for the State of Georgia, complained that the proposed bill "will delegate to the Pentagon the constitutional rights and powers imposed in the governors of the respective States to command their militia." *Armed Forces Reserve Act: Hearings on H. R. 5426 Before the Senate Subcommittee on Armed Services*, 82d Cong., 2d Sess. 312 (1952). The Adjutant General of Illinois, Leo M. Boyle, enclosed his prepared remarks protesting a prior proposal to "federalize" the National Guard. "I support the wisdom and farsightedness of our forefathers and the framers of the Constitution when they wrote the militia clause of the Constitution," Boyle wrote. "The National Guard system comprising as it does—

F. The Montgomery Amendment of 1986

In 1986, the Governor of Maine refused to allow 48 members of the Maine National Guard to participate in a training mis-

sion in Honduras. After several other governors threatened to follow suit, a Senate subcommittee began to explore the question of whether the gubernatorial consent provisions of the 1952 Act should be abolished. *See Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower & Personnel of the Senate Committee on Armed Services*, 99th Cong., 2d Sess. (1986) (stenographic transcript) (1986 Senate Hearings). The Department of Defense had counseled caution and hoped the crisis would fade over time.[31] In the end, the subcommittee took no action.[32]

One month later, Rep. Sonny Montgomery of Mississippi submitted an amendment to the proposed Defense Authorization Act of 1987 that would have prevented governors from exercising their veto power for foreign policy reasons. *See* Cong. Rec. H6267 (daily ed. Aug. 14, 1986). Because the proposal took the form of an amendment to the defense bill, debate on it in the House of Representatives was limited to a total of ten minutes. Moreover, there were no hearings on the amendment before it reached the floor for a vote. In response, many representatives noted the fundamental impropriety in making such a great potential change in defense policy—if not in the constitutional balance of power—without

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citizen soldiers—has always been a bulwark against the concentration of military power in our Federal Government." *Id.* at 310.

Thus, it appears that to counter the perceived "federalization" of the Guard, the National Guard Association proposed, among other things, an amendment requiring the consent of the governor of the State concerned before National Guard units could be called to active duty outside of national emergencies or the contingencies noted in Clause 15. Congress listened and enacted the gubernatorial consent provisions, 10 U.S.C. § 672(b) and (d).

[31] *See* Kester, *State Governors and the Federal National Guard* 11 Harv. J. L. & Pub. Policy 177, 179 (1988).

[32] The hearings were held with short notice, and many who wished to testify against the proposal were unable to do so. 1986 Senate Hearings, *supra*, at 8.

the benefit of hearings, *id.* at H6262-68 (remarks of Reps. Edwards and Schroeder) and with such limited debate.[33] The consideration of the bill was further overshadowed by ominous recurring warnings to the representatives that if they did not act quickly to eliminate the gubernatorial consent requirement, the federal government would eliminate funding to their state National Guards.[34]

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[33] With regard to the limited debate concerning the Montgomery Amendment, Rep. Dyson stated:

> Mr. Chairman, the Guard has no greater friend than the Gentleman from Mississippi [Mr. Montgomery], but I think this is a bad idea. We have not had enough time to look into this; 10 minutes per amendment is not enough time to fully understand a proposal as important and as far reaching as this amendment.

Cong. Rec. H6266 (daily ed. Aug. 14, 1986).

Rep. Schroeder stated:

> Basically, whether you agree or disagree, I think we all agree that if [the Montgomery Amendment] is unconstitutional according to many constitutional scholars, and if we have never had hearings, and if it has been functioning this way for over 200 years, why in the world the rush to put this in with a 10-minute debate on the House floor?
>
> I think that is playing too fast and loose.

Id. at H6267.

[34] For example, Rep. Montgomery warned the members of the House:

> If we do not adopt this amendment, and as I have said earlier, the National Guard is dead in the water; you can forget about it. You Governors are going to lose all your equipment; you are going to lose a lot of payroll, so you had better support this amendment and let the Guard keep going.

Cong. Rec., *supra* note 33, at H6267.

Moreover, on July 15, 1986, James H. Webb, Jr. told a Senate Armed Services Subcommittee that an alternative to retaining the gubernatorial consent requirement was "to give the fullest resourcing • • • to those units that are able to participate in 'real world' training missions • • • ." Prepared statement of Assistant Secretary of Defense for Reserve Affairs, *see* 1986 Senate Hearings, *supra*, at 5-14. Ten days later, on July 25, 1986, the House

In the end, calls for deliberation and caution did not prevail, and the full House, after 10 minutes of debate, approved the Montgomery Amendment 261-159. At conference, the Senate defense bill did not contain the proposed amendment. The conferees, however, made one technical change in the House version and included a notation on legislative intent that allowed the governors to withhold consent if they needed the Guard for local emergencies.[35]

As it became law, the Montgomery Amendment stated:

> The consent of the governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

10 U.S.C. § 672(f).

By "subsections (b) and (d)," the amendment referred to 10 U.S.C. § 672(b) and (d) which were part of the 1952 Act. These subsections provide for federal orders to active duty, or to active duty for the purpose of training with guberna-

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Committee on Armed Services strongly urged the chief of the National Guard Bureau to consider withholding funds from States that refused to participate in overseas training assignments. H.R. Rep. No. 718, 99th Cong., 2d Sess. 176 (1986).

[35] Specifically, the conference report stated:

> The conferees reiterate that under this provision, the governor still will have the authority to block the training if he or she thinks the guardsmen are needed at home for local emergencies. The conferees intend that nothing about the words "location, purpose, type, and schedule" should constrain a governor in according appropriate priority to a state or local emergency, such as a flood or other natural disaster.

Legislative History of Pub. L. No. 99-661, 99th Cong., 2d Sess. 475 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 6413, 6534.

torial consent, in situations neither contemplated by Clause 15 nor involving serious threats to the nation. Thus, the Montgomery Amendment, although allowing governors to withhold consent when local emergencies threatened, eviscerates the gubernatorial consent requirement in all other situations where the governors had substantive objections to active duty missions. In short, the Montgomery Amendment gives the federal government essentially unfettered authority over state National Guard units.

VII. *The Constitutionality of the Montgomery Amendment*

A. The Intent of the Framers.

The Montgomery Amendment contravenes the intent of the Framers. The Framers designed the militia (or National Guard) to serve as a check on the potential abuse of military power by the federal government. Specifically, they intended the states to exercise control over the militia (or National Guard) when the national security was not threatened. In these circumstances, the Framers assured the states that they would have authority to withhold support from military projects of the federal government they did not support. The Montgomery Amendment allows the government to make state National Guards part of a federal force essentially at will. This eliminates the state-controlled check on federal military power. Moreover, the Montgomery Amendment specifically frustrates state authority to resist federal military operations when the national security is not threatened.

The Framers created the second amendment to guarantee the perpetual existence of a state-controlled militia (or National Guard) as a check on the abuse of military power by the federal government. By effectively ending this state-controlled check on federal military power, the Montgomery Amendment cancels this guarantee.

Because the Framers intended state militias to check the power of the federal army, it is likely that they believed the army power could only supersede the state authority over the militia in narrowly confined circumstances, such as when the national security was threatened. The Montgomery Amendment, based on the theory that the army power supersedes state militia power at will, implicitly violates the Framers' intent.

Finally, the Framers believed that rights, such as reserved state power over the militia, were enumerated in the Constitution, in part, to be insulated from irresponsible, short-term political reaction. The recent refusal of the Governor of Maine to send state National Guard forces on training missions in Honduras is simply the proper exercise of a long dormant—and clearly intended—function of the states as a part of the federal system. The Montgomery Amendment—enacted without adequate hearings in the Senate, with no hearings in the House, with no reports issued by either body, with only 10 minutes of floor debate, and under the recurrent threat of federal fund "cut-offs" to non-cooperating states—was an ill-considered backlash to the exercise of an unpopular right by the state governments. It is precisely the sort of abuse of political power that the immutability of the Constitution was intended to protect against.

B. The Constitution

The Montgomery Amendment violates the plain language of the Constitution. To further the intentions listed above, the Constitution "reserv[es] to the States respectively * * * the Authority of Training the Militia * * *."

Although written two centuries ago, the words and the purpose behind this clause could not be more clear. The practicality—even the wisdom—of the decision to give the states

authority over training, like all of the decisions of the Framers, can be honestly disputed. However, in light of the powerful historical evidence, the fact that they made this decision for these reasons cannot be seriously questioned.

By effectively ending state control over National Guard training missions, the Montgomery Amendment violates an unambiguous command declared in the text of the Constitution.

C. The Supreme Court

The Montgomery Amendment is in conflict with the declarations of the Supreme Court. In the *Selective Draft Law Cases*, the Court stated that the army power can only supersede the states' reserved authority over the militia if the federal government, in its discretion, has determined the existence of a national exigency. Moreover, it acknowledged basic state authority over training. The Court's rationale was that the army clause and the militia clause were "distinct and separate," that both represented meaningful areas of authority, and that neither should be "weakened or destroyed" by construing the other power too broadly.

The Montgomery Amendment is not conditioned upon a congressional determination of national exigency. It effectively withdraws state authority over training, and both "weakens" *and* "destroys" reserved state authority over the militia.

D. The National Exigency Requirement

Implied in the congressional determination of a national exigency is the requirement of an affirmative declaration.

The Montgomery Amendment does not declare nor require the existence of a national exigency, nor does it appear to be directed at any specific threat to the national security. Its purpose is clear. In one legislative action it withdraws, "across

the board," substantive state power over the National Guard and gives the federal government essentially unfettered control over these forces.

E. Legislation

Congressional legislation concerning the National Guard has done nothing to change its underlying state-controlled character when the national security is not threatened. The Montgomery Amendment improperly departs from an unbroken pattern of congressional deference to reserved state authority over the militia (or National Guard) embodied in the militia clauses.

F. The Foreign Policy Argument

The government argues that the Framers could not have foreseen the degree of dependence that the United States has placed on National Guard troops. *See infra* note 36. If they had, the argument goes on, they would never have intended the states to possess the veto power given them in the 1952 Act. Thus, the government asserts that the gubernatorial consent requirement allows the states to participate in defense and foreign policy decisions in ways the Framers never would have sanctioned.

In response, the Framers made a conscious decision to place the bulk of the nation's defensive forces in the hands of state troops. Moreover, through much of American history, a large percentage of the nation's defensive forces have been organized in the form of militia or state National Guards. *See supra* note 3. Second, until 1986, state authority over these forces had been almost entirely unchanged by Congress. Further, while it is true that the Framers did not want the states to make positive national defense or foreign policy, they did intend the states to be a check on potential abuse of military power by the federal government. In this light, the gubernatorial veto requirement of the 1952 Act is a particularly apt legislative adaptation of a constitutional concept.

G. "Total Force" and the Militia Clause

The government argues that the Montgomery Amendment is necessary to ensure an effective national defense. However, it provides *no* evidence that the effectiveness of the national defense or of the National Guard will be diminished by an adherence to the constitutional principle of basic state control over the National Guard forces, absent a declaration of war or of national exigency.

In the last fifteen years, the National Guard has become a major part of the defensive force of the United States. After the Vietnam War and the presidential action discontinuing selective service registration, Congress decided to decrease the size of the standing military and to place increased reliance on reserve components, particularly on the National Guard. In this "Total Force" concept, the reserve components became major participants in the national defense effort.[36]

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[36] Secretary Webb noted in his Senate testimony that the Army National Guard provides 46% of the combat units and 28% of the support forces of the total Army. In the event of full mobilization, 18 of the 28 Army divisions would be provided wholly or in part by the Army National Guard. The Air National Guard of the United States operates and maintains more than 1700 aircraft. In the current fiscal year, the Air National Guard of the United States will provide 73% of our air defense interceptor forces, 52% of tactical air reconnaissance, 34% of tactical airlift, 25% of tactical fighters, 17% of aerial refueling, and 24% of tactical air support forces. *See* 1986 Senate Hearings, *supra*, at 56-1.

Secretary Webb further notes that the Army and Air Force National Guard are almost totally funded by the federal government. Since 1981, Congress has invested nearly $47 billion in manning, equipping, and training these forces. For the current fiscal year, Congress appropriated and authorized expenditures in excess of $8 billion to support their operations. *Id.*

The government maintains that the modern world has grown far more complex and dangerous than it was in 1787. The armed forces of the United States must today be able to respond rapidly to a broader range of potential threats to the national security than the Framers could have ever envisioned. Thus, the government argues, state-based limitations on federal control embodied in the militia clauses applied to a different time and different circumstances. The necessities of the modern world require this Court to act "pragmatically" and to read these anachronistic reserved powers either very narrowly or out of existence entirely.

The figures that the government cites show that the National Guard is a major part of the defensive force of the United States. However, if the national security is in any way threatened, the federal government can quickly assume total control over the National Guard by declaring a national exigency. Thus, in any situation demanding quick action, there would be no state-controlled obstacles to hinder the government's response

The government's second pragmatic argument follows closely from the first. Secretary Webb, in his Senate testimony, explains that, because of the nation's great dependence on the National Guard, these forces must be extremely well trained. This is necessary both so that they are prepared for all future emergencies and so that, at the appropriate time, they can mesh their operation with the regular army and other reserve components. *See* 1986 Senate Hearings, *supra*, at 56-6-8. Specifically, Secretary Webb asserts that the National Guard units must train in foreign environments with their unusual climates and terrain, alongside their full-time army and air force counterparts in order to achieve "operational readiness." Any interference by obstinate state governors in

this training process is likely to be disastrous in terms of the Guard's ability to operate effectively in a future crisis.

In response, all of the parties to this case agree that broad training experience for the National Guard is essential to the adequate defense of the United States. Indeed, even in the midst of the Honduran training controversy in 1986, Lieutenant General E. H. Walker, Chief of the National Guard Bureau,[37] stated:

> [N]o governor has said he opposes overseas deployment training—all have said they wholeheartedly believe in it and understand and support the need for it.

1986 Senate Hearings, *supra*, at 95-5.

Since the Guard began training overseas in the early 1970's, no governor has ever withheld his or her consent to a training mission or any type of mission—until the Guard recently began to train in Honduras. Moreover, states have never opposed training on the basis of terrain or climate. They have never opposed Guard exercises coordinated with regular forces. In short, they have never opposed the substance or content of training—nor are they likely to do so in the future. The states have only opposed an order for training when the real purpose of the order is something more than training. In the case of the Honduran controversy, the state objections all concerned

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[37] 10 U.S.C. § 3040 provides:

> (a) There is a National Guard Bureau, which is a Joint Bureau of the Department of the Army and the Department of the Air Force, headed by a chief who is an adviser to the Army Chief of Staff and the Air Force Chief of Staff on National Guard matters. The National Guard Bureau is the channel of communications between the departments concerned and the several States, Territories, Puerto Rico, the Canal Zone and the District of Columbia on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States.

the potentially dangerous implications that training in a politically explosive part of the world might have.[88]

In this light, the substance of the government's training argument is better understood. The government does not argue that gubernatorial consent prevents them from exposing Guardsmen to a proper diversity of climate or terrain or that it prevents them from training alongside their full-time army and air force counterparts. This could be easily done in non-controversial areas of the world, as it has in the past. The real essence of the government's argument must then be that the National Guard be completely free to train in areas of extreme political tension if it is to be an effective fighting force.[89]

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[88] As Senator Glenn stated at the hearings:

> I know back in my own state of Ohio this question came up, why Honduras and why now? I think we ought to face that. That is the reason we are up against this thing now. Normally, we train in Panama—we have done that for a decade and a half or so—to give them jungle training.
>
> The issue we have to address here and we have only touched on it peripherally is why Honduras? I think the concept, the view of many of the governors, is that we are looking for [political] support for a policy that all Americans do not agree with by sending people to Honduras.
>
> I am being blunt about that, but that is the fact. That has been editorialized across the country. That is the issue here really. Does the training have to be in Honduras?
>
> When they were being ordered down to Honduras, it was the very time there were border crossings, with reports of several hundred people being killed. The governor had the National Guard there when the perception was that we are sending our people into the combat zone. That was the public perception.

1986 Senate Hearings, *supra*, at 22.

[89] General La Vern E. Weber (Retired), former Chief of the National Guard Bureau, discussed the government's position in his testimony to the Senate Subcommittee:

> I submit to you that such deployments are highly desirable, but not absolutely necessary to achieve combat readiness levels.
>
> National Guard units can be trained to Federal standards of professionalism right here in the United States, in the schools and maneuver areas Congress has provided for that purpose.
>
> Deployment to areas outside the CCNUS [Continental United States] is highly desirable as adventure training, to enhance morale and give the troops a broad experience, but I submit to you that in a training sense, driving a bulldozer in Fort McCoy, Wisconsin, is very similar to driving a bulldozer in Honduras.

1986 Senate Hearings, *supra*, at 100-01.

General Weber also stated:

> The narrow issue here is whether or not Congress believes that Federal training standards must include duty in Honduras, regardless of the arena of operation to which units are intended to be deployed in some future conflict. If the Congress believes that, then all Army and Air units, Regular Guard and Reserve must be sent to Honduras.

Id. at 100.

General Weber concluded:

> Any legislative action at this time would not serve to improve Guard readiness or availability in the event of emergency or war.
>
> If the Congress is concerned that the Chief of the National Guard Bureau cannot employ current directives to ensure proper training of the Guard forces, they can, and should, direct that he report periodically on any instances of refusal to train which are likely to adversely impact on readiness.

Id. at 102.

This may well be the case, but the government has presented us with *no* evidence in terms of this argument.

Moreover, if the Honduran training controversy is a prototype of the dangers this country faces in the absence of the Montgomery Amendment, the following is of some interest. General La Vern E. Weber (Retired), former Chief of the National Guard Bureau, noted that the Honduran controversy had little effect on overall Guard training operations and suggested that any difficulties stemming from such a controversy in the future could easily be remedied through existing regulations and the withholding of federal funds from non-cooperative states. He stated:

> Based on my discussions with key leaders of the Guard, it is my opinion that recent public comments and actions by state authorities have not impaired the nation's ability to rely on the National Guard nor have they adversely impacted the units' readiness.
>
> I strongly agree and believe the recent actions are only an irritant which can be dealt with through existing statutes and regulations. The Chief of the National Guard Bureau has the authority to manage Federal funds appropriated for Guard Training and can direct action as Chief of the agency serving as the line of authority between the Army and Air Force and the states.

1986 Senate Hearings, *supra*, at 99.[40]

One last *pragmatic* consideration. It is important to realize that National Guard forces were involved in the recent invasion of Grenada and the bombing of Libya. In both of these instances, the Guard was activated under 10 U.S.C. § 672, for

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[40] General Walker described in careful detail the "crisis" in National Guard training operations that led to the Montgomery Amendment:

> In 1986 [the year the Montgomery Amendment was enacted] more than 42,000 members of the Army and Air National guards trained overseas in 46 countries. More than 9,000 Army and Air Guard personnel from 43 states and territories trained in Central America alone.
>
> * * * *
>
> The few Governors that have precipitated [the Montgomery Amendment] have stopped a total of 48 people from training in one country—Honduras—not the other 45 countries. *Those 48 people constitute .0001 percent of the total deploying force—less people than report to sick call on an average base on a given day, less people than have had to forego scheduled training for employer support reasons and less people than have had to forego participation due to other commitments. Clearly 48 people in comparison to the total deploying forces or the entire Guard strength is insignificant in terms of impact.*

1986 Senate Hearings, *supra*, at 94-3-5 (emphasis added).

"training", rather than under the operations provisions, 10 U.S.C. §§ 673, 673a, 673b, which require a declaration of emergency or consultation with Congress. *See* Testimony of Secretary Webb, 1986 Senate Hearings, *supra*, at 83;[41] Com-

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[41] The following exchange concerning the recent bombing of Libya by American forces comes from the 1986 Senate Hearings:

> Senator Levin: Would [the Libyan raid] be treated as a training mission?
>
> Mr. Webb: That was under 672(d) which is for training.
>
> Senator Levin: So, that use of National Guard troops in Libya was considered a training mission by the DoD?
>
> Senator Warner: Under the law.
>
> Senator Levin: Is that the way DoD considered it, training?
>
> Mr. Webb: Under the law.
>
> What you have is the compression of missions once the Total Force Doctrine came into effect so that you have National Guard units all over the world on any given day under the rubric of 672, which is a problem because you have to go all the way from 672 to a Presidential 100-K call-up with very little in between.
>
> I understand where you are going and it is a problem. We have a difficult time defining what is an operational mission with the compression of these missions under the Total Force Doctrine.
>
> Senator Levin: I wondered whether DoD considered that a training mission in Libya? That is my question.
>
> Mr. Webb: I do not have authority to speak on how Secretary Weinberger would have termed that.
>
> Senator Levin: Could you answer that also for the record? Could you check with the Secretary's office and let us know that, too?

1986 Senate Hearings, *supra*, at 82-83.

Secretary Webb later sent the subcommittee the following written response to Senator Levin's question:

> The Air National Guard aircraft utilized in support of the Libyan raid was already in Europe as part of routine tanker task force activities. Under long standing practice, Guard and Reserve air refueling aircraft supplement active force refueling aircraft assigned to a tanker task force stationed in Europe. The tanker task force provides day-to-day refueling training opportunities to Guard and Reserve crews, and is also available to the theater commander to meet any operational requirement

ment, *supra* note 2, at 636. Some commentators have suggested that this use of these active duty provisions for "training" was "surreptitious" and designed to elude the statutory requirements for operational missions. *See* Comment, *supra* note 2, at 636. Whatever the case, prior to the Montgomery Amendment, the governors, as the representatives of their states, provided at least some check on the potential abuse of these provisions. Without the governors, there would be no check at all.

VIII. *Conclusion*

The world has changed since 1787. It is smaller than it once was. We understand that today the nation's military forces often need to respond instantaneously—that the federal government may need to use troops in a variety of situations short of declared wars. Yet, the world has not changed so dramatically that we can no longer abide by the provisions of our Constitution, and we are not convinced that the national defense will be harmed by our respecting reserved state authority over the National Guard. The requirement that the President or the Congress declare the existence of a national exigency—particularly when that statement is not subject to challenge—is a small concession indeed to the doctrine of separation of authority which underlies our constitutional system.

When the nation did not face a specific threat from within or without, the Framers wished part of the nation's military power to be under the control of the states to check the possibility of abuse of military power by the federal government.

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that may arise. The Libyan raid was just such an operational requirement. The Guard aircraft was not sent to Europe for the specific purpose of participating in the Libyan raid. Under section 672(d) the crews can be on active duty, including active duty for training. The crew of this Guard aircraft was on active duty.

Id. at 83 (attachment).

In this vein, the Constitution of the United States "reserv[es] to the States respectively * * * the Authority of training the Militia * * *." When the words and the intent come together in such a manner, our duty is clear.

Thus, for the foregoing reasons, we find the Montgomery Amendment, which deprives the states of their reserved authority over training the National Guard, violates Article I, Section 8, Clause 16 of the Constitution of the United States. We therefore reverse the judgment of the district court and remand this matter to it for further proceedings consistent with this opinion.

MAGILL, Circuit Judge, dissenting.

This case presents the issue whether a federal statute that permits National Guard members to be ordered to active duty training without a governor's consent impermissibly infringes authority reserved to the states under the Constitution. Art. I, § 8, cl. 16. In my view, the district court correctly held that Congress' plenary authority to provide for the national defense encompasses the authority to train the Guard while in active federal service. *Perpich v. United States*, 666 F. Supp. at 1324. Therefore, I respectfully dissent.

I am in substantial agreement with the succinct analyses in this case by Judge Alsop and in a similar case by Judge Keeton in the Eastern District of Massachusetts. *Dukakis v. Dept. of Defense*, 686 F. Supp. 30 (E.D. Mass. 1988), *aff'd*, No. 88-1510 (1st Cir. Oct. 25, 1988). This dissent addresses particular aspects of the majority opinion which I believe are in error. The majority missteps in their derivation of the Framers' intent, and misconstrue Supreme Court precedent dealing with the relationship of the army and militia clauses. As a result, they arrive at a rule for "balancing" those two clauses that is at odds with the text and history of the Consti-

tution and unsupported by judicial authority. I offer an alternative reading of the Framers' debates on the army and militia clauses, consistent with the language and intent of those constitutional provisions.

I. SCOPE OF THE WAR POWER

The Constitution gives Congress broad authority to provide for the common defense. At times, the Supreme Court has discussed separately one or another of Congress' enumerated "war powers." *See, e.g., Tarbles Case*, 80 U.S. (13 Wall.) 397, 408 (1872). Other times, the Court has described Congress' "war power" in a manner that apparently comprehends all the grants of authority in the specific clauses of article I, section 8 that concern provision for the common defense. *See Lichter v. United States*, 334 U.S. 742, 757 (1948).

The war power, then, is not merely the power "to declare war" in clause 12. Congress is empowered to lay and collect taxes "for the common defense." Art. I, § 8, cl. 1. The power to raise, support, and regulate armed forces is part of the war power. Cl. 12-14. The powers to regulate and call for the militia are incidental to, and not separate from, Congress' authority to provide for the common defense. Cl. 15-16. James Madison wrote that the powers conferred upon the federal government with the objective of security against foreign danger were those of "declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money." *The Federalist No. 41* at 256 (J. Madison) (C. Rossiter ed. 1961). Thus, the legitimacy of Congress' exercise of authority in military affairs does not necessarily rest on the wartime-peacetime dichotomy urged by appellants nor on the express declaration of a national security emergency advanced by the majority.

The power to raise and support armies is central to Congress' war power in times of peace as well as war, because "it is the primary business of armies to fight or to be ready to fight wars should the occasion arise." *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975). "The responsibility for determining how best our Armed Forces should attend to that business" rests exclusively with the national government, *id.*, and the courts afford great deference to congressional action under the authority to raise and support armies. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). Even in the absence of a declared war, "the constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (upholding Congress' authority to classify and conscript for military service). *See also Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 326-28 (1936) (upholding peacetime maintenance of properties constructed in wartime under power to provide for national defense).

II. ROLE OF THE RESERVE FORCE

Pursuant to its constitutional authority, Congress has established reserve components of the armed forces. 10 U.S.C. § 211, *et. seq.* The Army and Air Force National Guard of the United States (NGUS) are included among the armed forces "ready reserve" components. 10 U.S.C. § 261. The purpose of the reserve force is "to provide trained units and qualified persons available for active duty." 10 U.S.C. § 262. Congress intended that the reserve be available for active duty "in time of war or national emergency and at such other times as the national security requires." 10 U.S.C. § 262.

Reserves may be ordered to active duty "in time of war or national emergency declared by Congress." 10 U.S.C. § 672(a). Active duty is also authorized if the President declares a

"national emergency," or if he "determines that it is necessary to augment active forces for any operational mission." 10 U.S.C. § 673, 673b(a). A reservist may be ordered to active duty "at any time" with the consent of both the individual reservist and the governor of his state guard. 10 U.S.C. § 672(d). And reserves may be activated "at any time" for not more than fifteen days a year, with the governor's consent. 10 U.S.C. § 672(b). The Montgomery Amendment qualified the governor's statutory right to withhold consent.

Appellants contend that the assignment of reserves to active duty for purposes of training, without the governor's concurrence, contravenes the "authority for training" the militia reserved to the states by Art. I, § 8, cl. 16. In other words, constitutional constraints on Congress' authority over the militia underlie the consent provisions of §§ 672(b) and (d). The Department of Defense responds that NGUS Reserves' membership in state National Guard units does not circumscribe Congress' authority to train reserve forces while in federal status. Once ordered to active duty, NGUS members are in the service of the United States and thus not subject to state control. 32 U.S.C. § 325 (National Guard members in active federal duty are relieved from duty in state National Guard).

Guard members were "federalized" in 1916, when they were required to sign an oath agreeing to be drafted into federal service and to serve abroad. Act of June 3, 1916, 39 Stat. 166. The role of the Guard as a reserve component of the army was firmly established in 1933, with the dual enlistment system that gave Guardsmen a dual status as reservists in the NGUS and as militiamen in the National Guards of their respective states. *Johnson v. Powell*, 414 F.2d at 1063; *Drifka v. Brainard*, 404 F. Supp. 425, 427 (W.D. Wash. 1968). In the Armed Forces Reserve Act of 1952, Congress defined the circumstances in which the Guard could be ordered to active duty as the NGUS. The governor's consent provisions were most likely political accommodations to secure support for the Act[1] and were not constitutionally compelled.[2]

Congress adopted the Armed Forces Reserve Act of 1952, "to provide for a more effective utilization of the reserve components, [and] to assure the maintenance of a strong and vigorous Reserve force." [3] The Montgomery Amendment is consistent with the purposes underlying the 1952 measure. Congress has since incorporated the NGUS as a central component of the Armed Forces, under the "Total Force" concept.[4] Congress' authority to provide for the common defense clearly includes the authority to provide for a reserve force. The exercise of that authority does not contravene the state's constitutional role over the militia merely because the

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[1] *Reserve Components: Hearings on H.R. 4860 Before the House Comm. on Armed Services*, 82d Cong., 1st Sess. 475-76, 482-83, 788 (1951).

During the Civil War, volunteers in the Army of the United States, though no part of the militia, were organized on a militia basis, and the states were given authority to commission officers. *Weiner* at 192. Thus the 1952 Act is not the only instance where Congress, in the discretionary exercise of its army power, gave some role over federal forces to the states for political, not constitutional, reasons.

[2] *Perpich*, 666 F. Supp. at 1324. *But see United States v. Peel*, 4 M.J. 28 (C.M.A. 1977). In *Peel*, although the court stated that the consent requirement had both "statutory and constitutional underpinnings • • • ," the constitutional reference was dictum, and the court made no analysis of the militia or army clauses.

[3] H. Rep. No. 1066, 82d Cong., 1st Sess. 1 (1951).

[4] *Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services*, 99th Cong., 2d Sess. (1986) (Testimony of James H. Webb, Jr.); H. Rep. No. 107, 98th Cong., 1st Sess. 202 (1983); Maj. op. at 54.

Reserves include state National Guard members ordered to active duty as federal reserves.[5]

[5] The compatibility of the dual enlistment system with the constitutional scheme providing for both armies and militia is better understood by considering the historical context of the Guard's dual status. American defense forces have, in a broad sense, reflected a "dual structure" since the earliest days of the United States. Arms have been borne concurrently by militia and Continentals, by volunteers and regulars, by National Guardsmen in state and federal service, by organized and unorganized militia. If there is any anomaly in the dual status of our armed forces, it is that historically it has been viewed as both strength and weakness in the way America provides for its common defense.

The militia's availability as both a state and federal force enabled government at both levels to carry out important missions. In the 18th and 19th centuries, the militia served their states far more often than the United States, and were frequently employed by state governments in maintaining public order. Mahon, *History of the Militia and the National Guard*, 61-62 (1983). Minnesota's own history provides 20th century examples of state Guard forces being called to state service. *Weiner* at 218 n.202. Furthermore, the President has, on occasion, called forth the Guard to perform the tasks enumerated in clause 15. *See, e.g.*, Executive Order No. 10730, Sept. 24, 1957, 22 F.R. 7628.

The dual structure has also been a weakness. The Continental Congress' difficulties in requisitioning the men and money necessary to wage the War of Independence were well-known to the Framers. In the War of 1812, militiamen balked at carrying out orders contrary to their understanding of the constitutional limitations to their service. In the Mexican War, volunteers were organized to carry out missions which Congress could not impose on the militia. During the Civil War, Congress again raised volunteers rather than rely on the militia, although the militia could have been called into federal service. During the Spanish War, the militia again was unavailable because foreign service was "outside the constitutional obligation resting upon the militia." *Weiner* at 187-192.

Similarly, the exercise of federal authority has been a problem at times for state uses of the militia. The militias as state forces suffered after the first World War when militiamen who had been drafted were discharged from federal service. Because no provision had been made to restore the militia status of returning guardsmen, states were left without a National Guard. *Id.* at 201, 205-06.

III. THE "CONFLICT" OF CONSTITUTIONAL CONTROL

Appellants contend that the militia clause admits of a plain meaning: the power to authorize National Guard training is reserved to the states, including the power to grant or withhold consent for particular training exercises prescribed by Congress. Appellants do not offer a plain meaning gloss of the army power, but insist that, however broad that power may be, it cannot permit Congress to accomplish by indirection what is elsewhere proscribed directly. *Anderson v. Martin*, 375 U.S. 399, 404 (1964). Appellants also refer to precedent holding that Congress' military power is subject to the constitutional requirement of due process. *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

The majority advances a rule for balancing Congress' army power with states' militia training power: congressional exercise of authority over "militia" training is permissible only (1) upon an express declaration (by the President or Congress) of "the existence of a national exigency or a specific threat to the national security," or (2) any other time when the state consents. Maj. op. at 35. This requirement purportedly derives from dicta in the *Selective Draft Law Cases*, 245 U.S. 366 (1918). This "exigency" rule is inappropriate because it is not obvious from the text of the Constitution, it does not square with a fair reading of the Constitution's history, and it is based on a misconstruction of the *Selective Draft Law Cases*.

The *Selective Draft Law Cases* and *Cox v. Wood*, 247 U.S. 3 (1918), are the only Supreme Court precedent addressing the scope of Congress' war power and possible limitations of that power in the militia clause. The Court held that Congress' power "to call for militia duty" was not limited by the militia

clause restrictions on the uses of federal militia. "[F]or the purpose of the war power," the militia clause was a "wholly incidental, if not irrelevant and subordinate, provision." *Cox v. Wood*, 247 U.S. at 6 (1918).

The majority reads the *Selective Draft Law Cases* to hold that "the war and army powers *invoked together* can supersede reserved state authority embodied in the militia clauses." Maj. op. at 23 (emphasis added). That reading ignores the Court's direct comparisons of the army power to the militia power without reference to the power to declare war.[6] The Court stated that "the power granted to Congress to raise armies was susceptible of narrowing the area over which the militia clause operated." *Selective Draft Law Cases*, 245 U.S. at 384. Congress' power in the "army sphere" was plenary and complete under the Constitution. *Id.* at 382. The exercise of the army power was "wisely left to depend upon the discretion of Congress." *Id.* at 383. Control of the militia was left to the states only "to the extent that such control was not taken away by the exercise by Congress of its power to raise armies." *Id.*

The majority continues its misreading, claiming that Congress' militia clause powers were created to "diminish" the use of the army power "to those situations in which such vast power was *strictly necessary*." Maj. op. at 29. The majority suggests that the militia powers "diminish" the power of

[6] The Supreme Court's reliance on the power "to declare war" as one of the clauses giving Congress authority to pass the statute challenged by the *Selective Draft Law Cases*, 245 U.S. at 377, yielded a narrow holding of the power to enact compulsory military service. Congress' authority to compel registration and draft in circumstances short of a declared war has been since upheld. *See United States v. O'Brien*, *supra*; *United States v. Crocker*, 420 F.2d 309 (8th Cir. 1970).

Congress to raise armies; in fact, the Supreme Court stated that the militia powers "diminished the occasion" *for use* of the army power. *Selective Draft Law Cases*, 245 U.S. at 383. The Court did not intimate that Congress' possession of power over the militia in any way fettered Congress' power to raise armies; "[t]he latter power when exerted was * * * complete to the extent of its exertion and dominant." *Id.* at 383. The Court concluded that Congress' power to raise armies was limited "only as in the discretion of Congress it was deemed the public interest required * * *." *Id.* at 383-84.

I find in the *Selective Draft Law Cases* no basis for the majority's conclusion that an express declaration of a national security emergency must precede Congress' exercise of its power to raise armies.

IV. THE FRAMERS' INTENT

From its survey of the drafters' and ratifiers' debates, the majority concludes that the Framers, motivated by a fear of standing armies, intended that the United States look to the militia as the principal military force for the nation's defense and as an essential check on federal military tyranny. The majority also concludes that, consistent with these purposes, the militia clauses must limit the assertions of congressional authority under the army clause.

The militia clauses spell out the circumstances in which Congress can call out the militia (clause 15), and divide authority for governance of the militia between the central government and the states (clause 16). The majority errs in reading these limitations on Congress' power over the militia as necessarily limiting Congress' exercise of the army power. The Constitution granted Congress power over the militia and the army to provide for the common defense. Powers over the militia reserved to the states should be interpreted consistently with that purpose.

A. Authority for the Common Defense

The majority opinion properly notes that correcting the obvious shortcomings of the Articles of Confederation was foremost among the Framers' objectives in drafting provisions concerning the common defense.[7] The majority errs, however, in asserting that the Constitution intends that principal reliance for the national defense be placed upon the state militias. Maj. op. at 6-7.

During the Framers' debates,[8] some delegates speculated that the militia could prove to be a military force sufficient to meet the immediate defensive needs of the United States.[9] But

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[7] *See also Selective Draft Law Cases*, 245 U.S. at 366.

[8] In the search for originalist interpretations of constitutional intent, a cautionary note is found in Madison's views, expressed in correspondence, that "a knowledge of the controversial part of the proceedings of its framers [should] be turned to no improper account * * *. As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character." Quoted in J. Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 936. Madison also cautioned against uncritical use of *The Federalist* because "it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates." *Id.* As an advocate, Madison ably shifted the emphasis of his own arguments as warranted by the tenor of the debates in the Constitutional Convention, *The Federalist*, and the Virginia ratification convention.

[9] The contrary view was also in evidence, however. At the Constitutional Convention, Mr. Pinkney of South Carolina expressed "but a scanty faith in Militia," opining that "there must be also a real military force." II Farrand, 332. In the ratification debate in the Virginia House of Delegates, H. Lee spoke from his soldiering experience in the War of Independence, defending the constitutional commitment of the army power to the central government: "I have seen proof of the wisdom of that paper on your table. I have seen incontrovertible evidence that the militia cannot always be relied on." 3 J. Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution*, 178 (1901). *See also The Federalist* No. 25 at 166 (A. Hamilton) (reliance on the militia "had like to have lost us our independence").

Congress' authority to raise, support, and regulate land and naval forces was not predicated on a first resort to the militia. The debates reflect the delegates' general distrust of standing armies. The delegates "hoped there would be no standing army in time of peace," unless a small one.[10] Yet their hopes and fears did not blind them to the possibility that "a standing force of some sort may, for ought we know, become unavoidable." [11] Indeed, a motion to fix a numerical limit on the size of the army in peacetime was unanimously rejected.[12] The Convention reached an agreement on the basic powers of Congress to provide for the public defense before they proceeded to debate Congress' power to call forth the militia.[13] Clearly, the Constitution commits provision for the common defense principally to the national government. Furthermore, the Constitution permits Congress discretion to rely on the powers in Congress' exclusive possession.

B. The Fear of Standing Armies

It requires a strained reading of the Framers' debates to conclude that the delegates who viewed primary state control of the militia as an essential check to federal military tyranny carried the day. Several structural provisions addressed the

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[10] II Farrand 326 (G. Mason).

[11] II Farrand 330 (J. Dayton).

[12] *Id.* at 330.

[13] *See* McHenry's concise summary of the Convention's progress on August 18:

> To make war, to raise armies[,] to build and equip fleets, amended to 'declare war, to raise and support armies, to provide and maintain fleets' to which was added 'to make rules for the government and regulation of the land and naval forces.[']
>
> The next clause [to call forth the aid of the militia] postponed.

II Farrand 333.

Framers' particular objections to standing armies[14] while vesting Congress with the discretion to raise armies when necessary for the common defense. The principles underlying these provisions—plenary authority in the central government, Congress' power of the purse, and the subordination of the military establishment to civilian control—retain their vitality today.

In James Madison's view, "the best possible precaution against danger from standing armies" was the "effectual establishment of the Union." [15] Without a strong central government, states left to their own devices could be picked off singly by outside enemies; if a state's government was usurped by an ambitious faction, jealousy might lead to armed conflict between the states themselves.[16]

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[14] Madison noted, at the Virginia convention, that the American people complained about the King's quartering of standing armies "because it was done without the local authority of this country—without the consent of the people of America." 5 Elliot at 413 (J. Madison). *See The Declaration of Independence*, para. 13-14. The need for structural restraints on standing armies was rooted in the American (and English) experience with military forces unrestrained by popular civil government. B. Bailyn, *The Ideological Origins of the American Revolution*, 61-65 (1967).

[15] *The Federalist No. 41* at 258-59 (J. Madison). The authors wrote at length against the perils of disunion. *Id., Nos. 3-5* (J. Jay); *Nos. 6-9* (A. Hamilton).

[16] The majority cites Madison's famous essay on controlling the effects of faction in support of the claim that reserved state authority was meant to check "ill-considered political reactions" by the Congress. Maj. op. at 22. In fact, Madison touted the advantages of the larger federal republic over the States in rising above "local prejudices" that might lead men to sacrifice the public interest to "temporary or partial considerations." *Id., No. 10* at 82-84.

The better check on "surreptitious" attempts to elude statutory restraints on the use of the Guard lies not with the Governors, Maj. op. at 61-62, but with the Congress.

The two-year limitation on appropriations for the army, modeled on Parliament's practice of controlling the purse strings for the King's army, was an additional precaution.[17] The requirement obliged congressional deliberation on the propriety of maintaining a standing military force, and was meant to forestall improvident vesting "in the executive department [of] permanent funds for support of an army."[18]

A third check was the republican structure of the new government. As explained by Alexander Hamilton, putting "the whole power * * * in the hands of the representatives of the people" creates an obstacle to the potential usurpation of power by the military establishment.[19]

A further check to the danger of standing armies was "the effectual provision for a good militia."[20] If the militia was "well-regulated" and disciplined, there would be less need for Congress to maintain a standing army in peacetime. The Constitution provided for a militia, subject to congressional call, primarily as an alternative to a national army, and not, as the majority contends, as a state force to be marshalled in opposition to the federal government.

The majority misreads Alexander Hamilton's explication of the army and militia powers. Hamilton wrote *The Federal-*

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[17] *Id., No. 41* at 259-60 (J. Madison). *See also* II Farrand 330 (H. Williamson) (limiting appropriation of revenue was the best guard against danger of a standing army); 5 Elliot at 393-94 (J. Madison) (Constitution puts "the purse * * * in the hands of the representatives of the people").

[18] *The Federalist No. 26* at 171 (A. Hamilton).

[19] *The Federalist No. 28* at 180 (A. Hamilton); *Id., No. 24* at 158 (A. Hamilton). *See also* 5 Elliot at 420 (J. Marshall) ("[A]s the government was drawn from the people, the feelings and interests of the people would be attended to, and * * * we should be safe in granting them power to regulate the militia").

[20] II Farrand at 386 (J. Madison). *See also* 5 Elliot at 381 (J. Madison).

ist No. 23 as a justification of congressional *discretion* in the plenary exercise of those "authorities essential to the care of the common defense."[21] The majority finds this patent interpretation directly contradicted by Hamilton's discussion of the militia power in *The Federalist No. 29*, and proceeds to "harmonize" the two essays in a manner that supports the rule that the army power can only supersede the states' reserved militia power in exigent circumstances. Maj. op. at 20-21.

The majority writes that "Hamilton, in *The Federalist No. 29* (along with Madison in *The Federalist No. 46*) declared that an essential purpose behind the states' reserved authority over the militia was to guard against the dangers of the federal army." Maj. op. at 19. On the contrary, Hamilton is writing to justify *congressional* authority over the militia, not the states' reserved authority: the check against standing armies comes from "an efficacious power over the militia *in the same body*" empowered to raise armies, *i.e.*, the Congress.[22]

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[21] *The Federalist No. 23* at 153 (A. Hamilton) (quoted by Maj. op. at 18).

[22] *The Federalist No. 29* at 183 (emphasis added). Hamilton begins the essay by noting: "The power of regulating the militia and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defense and of watching over the internal peace of the Confederacy." *Id.* at 182. Hamilton wrote a series of essays (Nos. 23-29) to justify the convention's proposals to "empower the Union," and to take issue with ratification opponents' arguments that the military powers granted to Congress were excessive. I disagree with the majority's claim that omission of any reference to the militia in *No. 23* is significant. Hamilton's personal sentiments about the relationship of the army and the militia may be found in his description of the army powers as "essential" to, and the militia powers as "incidents" of Congress' military power. Hamilton also described the militia as a "valuable and powerful *auxiliary*" force. *Id.*, *No. 26* at 173-74 (emphasis added).

Hamilton does describe the militia as both a "substitute * * * for a standing army, and the best possible security against it, if it should exist." By claiming that this passage supports the view that states retain militia authority principally as a check on federal tyranny, however, the majority takes Hamilton's remarks out of context. When Hamilton poses this dual function of the militia (as substitute for, and security against, a standing army), he is delivering a "discourse" of his "sentiments to a member of the federal legislature on the subject of a militia establishment." Hamilton advises his hypothetical Congressman to establish "a select corps of moderate size," rather than attempt to discipline the whole body of the militia. Congressional provision for a select militia could avoid the inconvenience attendant to disciplining the whole militia, produce a well-trained defense force, and lessen the need for a standing army. A select militia—established, armed and disciplined according to Congress' "well-digested plan"—would constitute "a large body of citizens, little if at all inferior to * * * [the army] in discipline and the use of arms, who stand ready to defend their * * * rights." Consequently, even "if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people." As envisioned by Hamilton, it was not reserved state authority, but the prudent exercise of federal authority over the militia, that would protect citizens' liberties from the spectre of an oppressive federal army.[23]

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[23] *Id.*, *No. 29* at 184-85. Nor does Madison, in *No. 46*, declare that state control of the militia is a principal check to federal military power. Madison dismissed the prospect of a federal military force deployed for "projects of ambition." That the people would let such a project come about "must appear to everyone more like the incoherent dreams of a delirious jealousy, or the misjudged ex-

C. The Militia Powers

The traditional nature of the militia, as a force subject to state control for defense of the states, was presumed by most of the Framers. The burden of persuasion lay with the advocates of a vigorous federal government that the militia was "a *National* concern, and ought to be provided for in the *National* Constitution."[24] Yet, in spite of the dire warnings of delegates opposed to federal control over the militia,[25] the

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aggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism." Even if such an "extravagant" supposition were made, Madison doubted whether a militia "of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence" could be conquered by regular troops. *Id.*, *No. 46* at 298-99.

Madison and Hamilton's discussion of their opponents' exaggerated suppositions should not obscure their principal point: citizens would see to it that their representatives in the federal government would exercise prudence and discretion in military affairs. Only in the unlikely event of the complete corruption or collapse of civil government would the military establishment be turned against the people.

[24] II Farrand 387 (J. Madison). The subject of regulating the militia was introduced to the Convention as a "power necessary • • • to the General Government." *Id.* at 326 (J. Mason). A number of delegates advocated full national control over the militia. *Id.* at 331, 386 (J. Langdon); *Id.* at 331 (J. Butler); *Id.* at 332 (J. Pinkney).

[25] Maryland's Luther Martin "was confident that the States would never give up the power over the Militia." *Id.* at 387. Elbridge Gerry of Massachusetts warned that giving the general government power over the militia was inconsistent with the states' continued existence. *Id.* at 388. The convention's "compromise" apparently failed to mollify Martin or Gerry, as they both opposed ratification at their respective state conventions. George Mason, who the majority identifies as a leader in the search for a compromise Maj. op. at 10, also argued against ratification at the Virginia convention. 5 Elliot at 378ff.

Constitution authorized substantial federal power to organize and call forth the militia.

The majority represents the language of clause 16, providing for the regulation of the militia, as a "workable compromise" crafted by committee, and meant to satisfy both federalists seeking national control over the militia and "states' rights delegates" intent on preserving sufficient state "authority to check the potential abuse of military power by the federal government." Maj. op. at 10.[26] Given my view, already expressed, that Congress may legitimately train the NGUS as a reserve component of the Armed Forces of the United States, the precise contours of respective state and federal authority over the militia (now the state National Guards) is of no moment in weighing the constitutionality of the Montgomery Amendment. This is so because, whatever authority is expressly or impliedly reserved to the states in the militia clause, the separate and superior federal power to raise armies is still paramount. *Cox v. Wood*, 247 U.S. at 6.

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[26] The Amici States find in the Committee's compromise language "conclusive evidence" of the states' exclusive sphere of control over training the militia. Amici States' Br. at 8. I am not persuaded that the debate over the Committee's resolution, subject to divergent parsings and numerous proposed amendments after it was reported back to the Convention, necessarily contained "apt, precise, definite expressions" of the Framers' intent. I am more of a mind with Cong. Abraham Baldwin, who opined in the House of Representatives in 1796 while debating the Treaty making powers, that

> "it was not supposed by the makers of [the Constitution] at the time, but that some subjects were left a little ambiguous and uncertain. • • • He believed this subject • • • of the Militia • • • was one of them."

III Farrand 369-70. The Convention voted down four attempts to amend or substitute, and a motion to recommit, the Committee's proposal; and Sherman's motion to delete the militia training clause was withdrawn. *Id.* at 385-86, 388, 617.

The supremacy of the federal army power is all the more apparent when the purpose of the militia clause is considered.

The majority's gloss of the militia clause obscures another articulated reason why the states wanted to preserve a measure of authority in organizing the militia: "not because of a fear of national control, but because the states might need to use the militia for their own purposes." [27] The division of authority over the militia in clause 16 is consistent with this purpose. A militia officered and trained by the states, and governed by the states when not in federal service, is available to answer the states' need for a civil defense force. This interest, and not state sovereignty in the abstract, or the state's power to resist military tyranny, gives meaning today to the militia clause reservations. Appellants claim that the states have a legitimate interest under the militia clause that would be "rendered meaningless and unprotected if the militia can be transformed without gubernatorial consent at any time during peacetime for an indefinite period into a federal entity solely for the purpose of peacetime training." App. Reply Br. at 9. Yet, appellants offer no concrete particulars of how the states' integrity might be compromised by federal active duty training. The Montgomery Amendment gives rein to the state's legitimate interest in using the militia to restore or maintain public order, because it still delegates to the governor the authority to block active duty training "if he or she thinks the Guardsmen are needed at home for local emergencies."[28]

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[27] Malbin, *Conscription, The Constitution, and The Framers: An Historical Analysis*, 40 Fordham L. Rev. 805, 824 n.69. Malbin generally offers a corrective to the analysis of the Convention advanced by Friedman (cited by Maj. op. at 7 n.2).

II Farrand 331 (O. Ellsworth); *Id.* at 331, 332, 388 (R. Sherman); *Id.* at 330-31 (J. Mason); *Id.* at 331 (J. Dickinson); *Id.* at 391 (J. Wilson).

[28] S. Rep. No. 331, 99th Cong., 2d Sess. 475 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 6534.

So long as Congress' provision for ordering the National Guard to active duty in federal status does not impair the states' ability to keep up or deploy the militia in furtherance of the states' interest, the Constitution's reservation of state authority is not offended.

V. CONCLUSION

Congress' constitutional authority to govern the National Guard as a component of the Armed Forces of the United States does not depend on the concurrence of the states. Nor does the constitution mandate that an express declaration of a national security emergency must precede any particular deployment for training of the reserves. Therefore, I would affirm the order of the district court granting the Department of Defense's motion for summary judgment.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals,
Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-87 CIV 54

RUDY PERPICH, Governor of the State of Minnesota, and the STATE OF MINNESOTA, by its Attorney General, Hubert H. Humphrey, III,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE AIR FORCE; UNITED STATES DEPARTMENT OF THE

ARMY; NATIONAL GUARD BUREAU; CASPAR W. WEINBERGER, Secretary of Defense; JOHN O. MARSH, JR., Secretary of the Army; EDWARD C. ALDRIDGE, Secretary of the Air Force, and LIEUTENANT GENERAL HERBERT R. TEMPLE, JR., Chief, National Guard Bureau,

Defendants.

MEMORANDUM ORDER

Richard K. Willard, Assistant Attorney General and Jerome G. Arnold, United States Attorney, by VINCENT M. GARVEY, LESLIE K. SHEDLIN, Washington, D.C. and JOHN LEE, Minneapolis, Minnesota, appeared for defendants.

Hubert H. Humphrey, III, Attorney General for the State of Minnesota by JOHN R. TUNHEIM and PETER M. ACKERBERG, St. Paul, Minnesota, appeared for plaintiffs.

This matter came before the court on June 15, 1987, upon motions brought by both sides to the lawsuit. Defendants move for a dismissal for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Because defendants submitted materials outside the pleadings, the court shall treat this motion as one for summary judgment. Fed. R. Civ. P. 12 (b). For their part, plaintiffs move the court for summary judgment in their favor. Both parties agree that there exist for resolution no disputed issues of fact, and this matter is ripe for summary judgment.

The court reiterates its gratitude to the parties, amici, and their counsel for the able and helpful manner in which they have prepared and submitted this case.

STATUTORY BACKGROUND

Broadly stated, the issue before the court in this action is the status of the National Guard under the United States Constitution. The term "National Guard" refers to two overlapping, but legally distinct, organizations. Congress, under its constitutional authority to "raise and support armies" has created the National Guard of the United States, a federal organization comprised of state national guard units and their members.[1] These state units also maintain an identity as state national guards, part of the militia described in Article I, Section 8 of the Constitution.

Congress has regulated the National Guard under provisions found in Titles 10 and 32 of the United States Code. The provisions in Title 10 relevant to the National Guard deal exclusively with the National Guard of the United States, a ready reserve component of the Army and Air Force. Sections 672 (b) and (d) of Title 10 pertain to the active duty of units or members of the National Guard of the United States:

672. Reserve components generally

* * * * *

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under

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[1] *See* H.R. Rep. No. 141, 73rd Cong., 1st Sess. 2-5 (1933); *Weiner, The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 208, 208 n. 153 (1940).

this subsection without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

* * * * *

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

* * * * *

In 1985 and 1986, several governors either withheld their consent under the provisions of §§ 672(b) and 672(d) and objected to the active duty deployment of National Guard personnel to Central America or indicated their intention to do so. *See* 132 Cong. Rec. H6264-H6268 (daily ed. Aug. 14, 1986). In response to these actions, Congress enacted an amendment offered by Representative Montgomery which precludes governors from withholding their consent under §§ 672(b) and 672(d) because of objections to location, purpose, type, or schedule of the active duty.[2]

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[2] 10 U.S.C. § 672(f):

The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

UNDISPUTED FACTS

Pursuant to §§ 672(b) or 672(d) of Title 10, United States Code, defendants ordered members of the Minnesota National Guard to active duty for training missions in Central America. These missions were conducted January 3-17, January 9-25, and January 22-26, 1987. Plaintiff Rudy Perpich, Governor of Minnesota, would not have consented to one of the training missions ordered by defendants in January 1987 but for the restrictions imposed by § 672(f). Plaintiffs expect the defendants will order members of the Minnesota unit of the National Guard to active duty for training purposes outside the United States in the future, and plaintiff Perpich intends to withhold consent to defendants' orders if he objects to the location, purpose, type, or schedule of such training.

DISCUSSION

Plaintiffs contend the Montgomery amendment offends the Militia clause of the Constitution[3] by impermissibly impinging upon the states' "authority of training the militia." Plaintiffs argue that the Militia clause reserves to each state exclusive power over training of the National Guard,[4] and this reserva-

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[3] Art. I, § 8:

The Congress shall have Power . . .

Cl. 15:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

Cl. 16:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

[4] "The National Guard is the modern Militia reserved to the states by Art. I, § 8, cl. 15, 16 of the Constitution." *Maryland v. United States*, 381 U.S. 41, 46 (1965) (citation omitted).

tion requires that Congress obtain gubernatorial consent to training during peace time. Plaintiffs further argue that neither the Army clause[5] nor the Necessary and Proper clause[6] negates the reservation of peace time training authority over the National Guard found in the Militia clause.

When ordered to active duty under § 672, defendants argue, the National Guard is "Employed in the Service of the United States." *See* Art. I, Sec. 8, cl. 16. In this status, defendants assert, the National Guard is governed by Congress' plenary power under the Army and Necessary and Proper clauses to provide for the national defense. Defendants contend that the reservation to the states of authority over training the guard simply does not come into play while the National Guard is employed in the service of the United States.

Although this action arises out of a dispute between the parties over the propriety of deploying elements of the Minnesota Unit of the National Guard to Central America for training purposes, the court emphasizes that the wisdom of that deployment is in no sense an issue in this case. Judgment as to the wisdom of this program lies exclusively within the purview of the political branches of government. This court must determine only whether Congress has the power to act as it has.

I. *Historical Development of National Guard*

An understanding of the historical development of the National Guard, particularly as it relates to the evolution of the Guard's dual status, is necessary to a resolution of the parties' dispute. From the time of the Constitution's ratification through the Spanish-American War, the militia, which became known as the National Guards in the latter half of the nine-

[5] Art. I, § 8, cl. 12.
[6] Art. I, § 8, cl. 18.

teenth century, was a loosely trained force best suited to drills and "showy parades in harlequin uniforms." *See Wiener, The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 191 (1940) (hereinafter "*The Militia Clause*"); *Federal Aid in Domestic Disturbances*, Sen. Doc. No. 263, 67th Cong., 2d Sess. 205 (1922). As in each previous conflict the nation experienced, the National Guards' performance in the Spanish-American War was unsatisfactory. Some units stood upon their constitutional rights and refused to serve outside the United States. *The Militia Clause, supra*, at 192. Because of inadequate and incompatible training, those units that did serve did so ineffectually. *Id.*

Dissatisfaction with the National Guards' performance in the Spanish-American War lead Congress in 1903 to enact the Dick Act, a program of financial grants to state National Guard units. Units receiving grants were required to conform to national standards, including the requirement for drill at least 24 times per year and attendance at a five day summer camp. *Id.* The National Defense Act of 1916 further expanded the federal government's involvement in the maintenance and training of the National Guard. In addition to reorganizing and expanding the Regular Army and creating an Officers Reserve Corps, the Act restructured the National Guard to enable it to serve as an integral component of the Army of the United States. This restructuring dramatically increased the scope of federal control over the guard by expanding federal financial support for Guard units, prescribing the qualifications of National Guard officers, and providing for their recognition by federal authorities only should they be found qualified. The 1916 Act also required every officer and enlisted man in the National Guard to take a dual oath to support the Nation as well as the State, and to obey not only the governor but also the president. *Id.* at 200-201.

In the years following World War I, the National Guard again was reconstituted. During this time, the nation was moving toward a "One Army" concept, under which the Regular Army and the various reserve and militia organizations were unified under the administration and command of The United States Army. *Id.* at 207. In time of peace, however, the National Guard was not yet a part of the Army: "the Army of the United States shall consist of the Regular Army, the National Guard while in the service of the United States, and the Organized Reserves, including the Officers Reserve Corps and the Enlisted Reserve Corps." National Defense Act, § 1, as amended in 1920, 41 Stat. 759 (1920); *The Militia Clause, supra,* at 207.

In 1933, Congress amended the National Defense Act to create the National Guard of the United States as a reserve component of the Army of the United States. Act of June 15, 1933, 48 Stat. 153, 155. In this capacity, the National Guard of the United States was organized and was to be administered under the Army Clause. *The Militia Clause, supra,* at 208; *see* H.R. Rep. No. 141, 73rd Cong., 1st Sess. 2-5 (1933). In the Armed Forces Reserve Act of 1952, Congress enacted forerunners of the current gubernatorial consent provisions of 10 U.S.C. §§ 672(b) and 672(d). Act of July 9, 1952, ch. 608, §§ 233(c) and 233(d), 66 Stat. 481, 490. Congress enacted these provisions in response to objections from state National Guard officials who sought to limit the scope of the federalization of the National Guard in part on constitutional grounds. *Armed Forces Reserve Act: Hearings on H.R. 5426 Before the Senate Subcommittee on Armed Services,* 82nd Cong., 2nd Sess., 127, 246, 310, 312 (1952). Following the Armed Forces Reserve Act of 1952, no further changes relevant to this action

were made in the legal status of the National Guard until the enactment of the Montgomery amendment in 1986.

The Guard's status as a reserve component of the United States armed forces, however, continued to evolve. Today, as a part of the nation's Total Force military capability, 18 of the 24 Total Army divisions available in the event of war would be provided in whole or in part by the Army National Guard. Similarly, the Air National Guard provides 73 percent of the nation's air defense interceptor forces, 52 percent of tactical air reconnaissance, 34 percent of tactical airlift, 25 percent of tactical fighters, 17 percent of aerial refueling, 13 percent of air rescue and recovery forces, 14 percent of special operations forces, and 24 percent of tactical air support forces. *Declaration of James H. Webb, Jr.,* Attached Statement at 1. Thus the National Guard has assumed a significant role in the nation's military readiness program.

II. *Analysis*

All authority to provide for the national defense resides in Congress, and state governors have never had, and never could have jurisdiction in this area. *The Selective Draft Law Cases,* 245 U.S. 366, 383 (1918); *Houston v. Moore,* 5 Wheat. 1, 16 (1820). For example, Article I, Section 10, Clause 3 of the Constitution prohibits states from keeping troops or ships of war in time of peace and from engaging in war, unless actually invaded. In addition, the Militia clause has not been read to restrict Congress' plenary authority to provide for the national defense. *The Selective Draft Law Cases,* 245 U.S. at 383.

Congress' establishment of the dual enlistment system, under which National Guard members serve as members of both a state national guard and of the National Guard of the United States, is a valid exercise of Congressional power

under the Army and Necessary and Proper clauses. *Johnson v. Powell*, 414 F.2d 1060, 1063-64 (5th Cir. 1969); *Drifka v. Brainaird*, 294 F.Supp. 425, 428 (W.D. Wash. 1968); *see* H.R. Rep. No. 141, 73rd Cong., 1st Sess. 2-5 (1933). Thus an authority designated by the Secretary of Defense or the Secretary of a military department may call National Guard units and members to active duty under § 672(b) and 672(d) and the Militia clause does not inhibit this power. *See The Selective Draft Law Cases*, 245 U.S. at 383; *Johnson*, 414 F.2d at 1064. Because Congress' authority to provide for the National defense is plenary, the Militia clause also cannot constrain Congress' authority to train the Guard as it sees fit when the Guard is called to active federal service.[7]

As the Militia clause does not restrain Congress' authority to train the National Guard while the Guard is in active federal service, the gubernatorial veto found in §§ 672(b) and 676(d) is not constitutionally required. Having created the gubernatorial veto as an accommodation to the states, rather than pursuant to a constitutional mandate, the Congress may withdraw the veto without violating the Constitution.

Plaintiffs draw the court's attention to the debate and negotiations over the Militia clause at the Constitutional Convention. Plaintiffs argue that the course of this debate evinces an intent on the part of the framers of the Constitution to preserve in the states what Alexander Hamilton described as a "preponderating influence" over the militia. Federalist No. 29 (Mentor ed.) at 186. Preservation of this local influence, effectuated by reserving to the states authority

[7] *See also* Art. I, § 8 cl. 16 ("The Congress shall have Power . . . To provide . . . for governing such part of [the militia] as may be employed in the service of the United States").

over training and appointment of officers, served as a check upon the power of the federal government. In particular, the sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured by a militia comprised of men who were civilians primarily, soldiers on occasion. *United States v. Miller*, 307 U.S. 174, 179 (1939).

The proposition that the Congress may train the National Guard while the Guard is employed in the service of the United States is not inconsistent with the concerns voiced at the Constitutional Convention. Indeed, the states retain shared control over the training of the Guard while it is not on active federal duty. The states relinquish this authority, and its attending influence, only when Congress calls the National Guard to federal duty pursuant to its authority under the Army and Necessary and Proper clauses. When Congress so acts, the language of the militia clause is relevant only insofar as its provision granting Congress authority "for governing such part of [the militia] as may be employed in the service of the United States," makes it clear that the reservation to the states of the appointment of officers and the authority of training does not restrict the authority of Congress to govern the National Guard while it is in federal service.[8]

Plaintiffs further contend the court should recognize that the Militia clause reserves to the states authority over training the National Guard in time of peace, and restricts Congress'

[8] In addition, utilization of the National Guard as a reserve component of the nation's Total Force military capability reduces the need for a large standing army. Reading the Constitution to permit Congress to train the Guard effectively for this mission therefore is consistent with the framers' intent to avoid the establishment of such an army.

training authority to war time. There is no basis for this distinction in the language of the Constitution. Instead, the relevant dichotomy in the constitutional language is between federal service and state service. *See* Article I, sec. 8, cl. 16 ("The Congress shall have Power . . . To provide . . . for governing such Part of [the militia] as may be employed in the Service of the United States. . . ."). Viewing the reservation to the states of authority over training the militia in light of this dichotomy harmonizes the Army and Militia clauses, and gives each its proper significance. *See, e.g., Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975) (the various provisions of the Constitution are to be construed harmoniously with the states' reserved powers).[9] Thus the court concludes that Congress may exercise plenary authority over the training of the National Guard while the Guard is on active federal duty, and must share with the states authority over training of the Guard only while the Guard is not "employed in the Service of the United States." Under this analysis, Congress acted

[9] The position taken by Amici Curiae National Guard Association of the United States, in support of defendants' motion for summary judgment, is inconsistent with this analysis. Amici argue that the Militia clause provision reserving to the states the "Authority of training the Militia *according to the discipline prescribed by Congress*" (emphasis added), gives the Congress unrestricted authority over training the National Guard, whatever its status. Under this view, the Congress apparently could order the National Guard to training exercises outside the United States even without calling the Guard to active federal duty pursuant to statute. Until the Congress calls the National Guard to active federal duty, however, it lacks the plenary authority provided by the Army and Necessary and Proper clauses, and instead must share authority over training with the states. This necessity of shared authority over training the National Guard when it is not employed in the service of the United States would preclude Congress from exercising the sort of unrestricted control over the National Guard the defendant Amici envision.

within its authority in providing for the active duty training of the Minnesota National Guard in Central America without plaintiff Perpich's consent, and plaintiffs' challenge to the Montgomery amendment's constitutionality must fail.

Based upon the foregoing, the arguments and submissions of the parties, and the record as presently constituted,

IT IS ORDERED That plaintiffs' motion for summary judgment be and the same hereby is respectfully denied.

IT IS FURTHER ORDERED That defendants' motion for summary judgment be and the same hereby is granted.

IT IS FINALLY ORDERED That the Clerk enter judgment as follows:

> IT IS ORDERED, ADJUDGED, AND DECREED That plaintiffs' action be and the same hereby is dismissed with prejudice.

Dated: August 3, 1987.

DONALD D. ALSOP
Chief U. S. District Judge